86-53 ①
No.

Supreme Court U.S.
FILED
JUL 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

WILLIAM A. AMODEO, ROBERT A. BIANCAMANO, BRUCE R. BONACUM, JOHN C. BRUNNER, RICHARD G. BURNS, KENNETH M. CARLSTROM, CHARLES J. CONTEGNI, CHARLES DARCY, WAYNE E. ENNIS, JAMES J. FINNEGAN,

Petitioners,

against

DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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67 pp

Questions Presented.

1. Is Federal Rule of Appellate Procedure 38 authorizing the imposition of punishment for the filing of "frivolous" appeals unconstitutionally vague for failing to establish standards to determine "frivolity"?

2. Were the petitioners' due process rights infringed by case consolidation and application of the lead case procedure?

3. What standards should be applied in determining whether an appeal is frivolous under Federal Rule of Appellate Procedure 38?

4. Were the appeals of the petitioners "frivolous"?

[Note: Petitioner reserves the right to argue Question 4 in the event certiorari is granted on any or all of Questions 1-3 but does not include Question 4 among the reasons for granting certiorari.]

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986.

WILLIAM A. AMODEO, ROBERT A. BIANCAMANO, BRUCE A. BONACUM, JOHN C. BRUNNER, RICHARD G. BURNS, KENNETH M. CARLSTROM, CHARLES J. CONTEGNI, CHARLES DARCY, WAYNE E. ENNIS, JAMES J. FINNEGAN,

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petition for a Writ of Certiorari.

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit, entered in the above entitled proceeding on April 16, 1986.

Opinions Below.

The opinions below are all reprinted in the appendix to this petition at the pages indicated below:

Court	**Subject & Date of Opinion**	**Appendix Page**
Federal Circuit Court of Appeals ("FCCA")	Decision awarding $5,000 costs and attorneys fees to Dept. of Justice - 4/16/86	A-1
FCCA	Decision temporarily staying decision of 4/16/86 -5/16/86	B-1
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FCCA	Decision denying rehearing in banc of 5/23/86 decision - 6/5/86	D-1
United States Supreme Court ("USSC")	Decision denying stay of FCCA decision dated 5/23/86 pending certiorari consideration - 5/30/86	E-1

Jurisdiction.

The petitioners initially sought review of the Department of Transportation, Federal Aviation Administration's ("FAA") decisions to terminate their employment before the United States Merit Systems Protection Board ("MSPB") pursuant to 5 U.S.C. §§7511-7513, and 5 CFR §752.405(a).

After MSPB affirmance of the FAA's decisions to discharge the petitioners, the petitioners sought review of the MSPB decision in the Federal Circuit Court of Appeals ("FCCA") pursuant to 5 U.S.C. §7703(c), and 28 U.S.C. §1295(a)(9).

Following affirmance of the MSPB decisions by the FCCA, the United States Justice Department's motion to impose costs and attorneys fees under Federal Rule of Appellate Procedure ("FRAP") 38 was granted by the FCCA on April 16, 1986.

The jurisdiction of this Court to review the judgment of the Federal Circuit Court of Appeals is invoked under 28 U.S.C. §§1254(1).

Statute Involved.

Federal Rule of Appellate Procedure 38.

Damages for Delay.

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Statement of the Case.

A. Background Before Solerwitz Representation of ATCs.

Petitioners are former air traffic controllers who were employed by the FAA. Petitioners are nonprobationary employees in the competitive civil service of the federal government who acquired that status through years of staisfactory job performance.

In August 1981 petitioners were discharged for their alleged participation in a strike that month called by the Professional Air Traffic Controllers' Organization ("PATCO").

The PATCO strike effected approximately 12,700 air traffic controllers ("ATCs") at geographically diverse locations throughout the Continental United States, Alaska, and Hawaii.

The circumstances surrounding each of the petitioner's discharges were different. At different air traffic control centers the FAA employed different procedures when discharging the ATCs. Not all ATCs agreed with or supported the strike. Some ATCs were not scheduled to work during the strike. Some ATCs were on official leave approved by their superiors during the strike. Some ATCs wanted to return to work following President Reagan's August 3, 1981 telecast from the White House Rose Garden directing them to return to work but were unable to do so because they were locked out of their air traffic control stations by the FAA.

PATCO's attorney, Richard J. Leighton, of Washington, D.C., initially advised PATCO's leadership that the federal government would *not* discharge all traffic controllers in the event of a nationwide strike. After his advice proved wrong, Leighton undertook representation of many ATCs whose jobs were terminated.

Following the PATCO strike, the FAA sent *individual* air traffic controllers adverse action notices proposing their removal for their alleged participation in a strike, and their absence without official leave (AWOL) pursuant to 5 U.S.C. §7513(b).

Individual ATCs filed *separate* responses in opposition to the proposed notice of removal pursuant to 5 U.S.C.

§7513(b). They were mailed *separate* notices of termination by the FAA. And they filed *separate* timely appeals of their removal action to the MSPB under 5 U.S.C. §7513(d) and §7701. Thus, in *Amodeo v. United States** (FCCA Appeal No. 83-1162) the record before the FCCA reflects that Amodeo was sent a notice of adverse action on August 6, 1981 (F17-F19)**; Amodeo filed a written response on August 13, 1981 (F23, F24); Amodeo received a written notice of termination which was mailed on August 19, 1981 and made effective August 22, 1981 (F25, F26) and Amodeo filed a timely appeal to the MSPB on September 2, 1981.

In a case involving another petitioner *Biancamano v. United States* (FCCA Appeal No. 83-1163) the FCCA record reflects that *Biancamano* was sent a notice of adverse action notice on August 12, 1981 (F29, F30); responded to the adverse action notice on August 14, 1981 (F31, F32); received a notice of termination mailed on August 25, 1981 and made effective on August 28, 1981 (F32, F33); and, filed a timely appeal with the MSPB on September 2, 1981 (F5-F10).

On October 30, 1981, Leighton moved to consolidate the 11,000 ATC appeals before the MSPB in *Trick v. F.A.A.* ___ MSPB ___ (No. DC 0752811F1144, MSPB 12/17/81) (*Appendix G* to this petition). The FAA *opposed* the consolidation on November 30, 1981. On December 17, 1981 the *MSPB denied the motion for national consolidation of the ATCs' appeals.* (*Appendix G* to this petition is the MSPB denial of the motion for national consolidation.)

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*The procedural history of the case for each petitioner from the date of the Proposed Notice of Adverse Action until the MSPB form was filed is set forth in *Appendix F* to this petition at pages F1 to F4.

**(F17-F19) refers to pages in the Petitioners' Combined Appendix before the FCCA which are pages F-5 to F-28 in *Appendix F* to this Petition.

B. Solerwitz's Representation of ATCs.

In February 1982 petitioners Brunner, Burns, Carlstrom, Darcy, and Kinnegan engaged their present counsel in these actions, Jack B. Solerwitz. Petitioners Amodeo, Biancamano, Bonacum and Ennis engaged Solerwitz sometime after February 1982.

Through the date of this petition at least 130 ATCs including the petitioners engaged Solerwitz to represent them. ATCs in Alaska and Hawaii are among those represented by Solerwitz.

When Solerwitz undertook representation of the petitioners their cases were stalled in the MSPB and the FAA had denied discovery essential to the prosecution of petitioners' appeals.

On February 10, 1982, Solerwitz filed a motion seeking a writ of mandamus on behalf of the Petitioners against the MSPB in the United States District Court for the Eastern District of New York (CV 82-0331).

Around February 25, 1982 Solerwitz filed *individual* motions for disclosure and document production on behalf of *each* petitioner.*

1. *Denial of Discovery Requests for Information About Individual ATCs' Cases.*

Solerwitz's rigorous pursuit of motions to compel the FAA to disclose information (1) in *each* petitioner's personnel file, and (2) regarding the FAA's knowledge of the facts concerning *each* petitioner's alleged participation in the August 1981 strike is significant.* In its April 15, 1986 decision fining Solerwitz the *FCCA did not mention* the extensive motion practice between March 2, 1982 and July

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**Appendix H* to this petition is a sample of the discovery Solerwitz sought for ATC Amodeo which is similar to the discovery sought for the other petitioners.

8, 1982 (*Appendix I* is a summary of the motion practice between those dates) wherein Solerwitz's attempts to compel the FAA to disclose information regarding *individual ATCs* were frustrated through the discovery order of Chief Administrative Law Judge John J. McCarthy dated April 17, 1986. ["ACJ-1"] (*Appendix J* to this petition is Judge McCarthy's discovery order.)

ACJ-1 limited the individual discovery of facts concerning *each Petitioner* which Solerwitz had sought. ACJ-1 required that "national discovery" requests be made through the "lead counsel" and thereby reduced the individual information Solerwitz attempted to obtain concerning the Petitioners' cases through discovery.

Although Solerwitz had included as many facts about each Petitioner in each Petitioner's brief to the FCCA as the MSPB's discovery order allowed him to learn*, the FCCA emphasized Solerwitz's failure to emphasize individual facts in each brief as a criteria indicating that Solerwitz had filed frivolous appeals.

The FCCA opinion dated April 15, 1986 at pages 2 and 3 refers to "eleven separate, although virtually identical . . . briefs" filed "In June, 1983" and "In February, 1985" by Solerwitz. The same opinion at page 6 says:

> [Solerwitz] made no effort in his briefs to distinguish these ten cases from previously decided cases or from each other . . .

Thus, the FCCA punished Solerwitz for failing to supply additional individual facts in the petitioners' briefs, and totally ignored Solerwitz's sustained formal efforts in several motions to obtain those facts (which efforts were frustrated by the denial and/or modification of Solerwitz's discovery motions by the MSPB). Grounding the decision that the Petitioners' appeals were "frivolous" upon the failure to include additional individual facts in the briefs (which appellate counsel attempted to learn but couldn't under the MSPB's adverse discovery order ACJ-1) punished Solerwitz for *not* obtaining a broader MSPB discovery order.

**Appendix K* to this petition are excerpts from the briefs Solerwitz filed with the FCCA on *Amodeo* and *Biancamano*.

Finding appeals to be "frivolous" based upon inadequacies in the briefs' factual statements (which appellate counsel did *not* control because the *MSPB prevented discovery essential to learn individual facts*) is one example of the confusion which occurred in this case in the absence of criteria for determining when an appeal is "frivolous" under FRAP Rule 38.

2. *Petitioners' Opposition to "Consolidation", "Lead Counsel", and "Lead Case" Methodology.*

From the outset of his engagement in February 1982, Solerwitz's representation of the petitioners was based upon the premise that each case should be decided upon its unique facts.

Solerwitz drafted and vigorously pursued discovery before the MSPB for *each* petitioner. *Supra* pp. 7-9. As previously noted, the MSPB Chief Administrative Law Judge's decision ACJ-1 by limiting discovery prevented Solerwitz from obtaining facts essential to distinguish *any* of the petitioners' cases from the "consolidated" cases decided by the MSPB or the "lead" cases decided by the FCCA.

Solerwitz's ability to oppose consolidation of the petitioners' cases before either the MSPB or the FCCA was emasculated by ACJ-1's denial of individual discovery of the circumstances surrounding the alleged strike participation by each petitioner in the FAA files.

On June 4, 1982 at a prehearing conference concerning the petitioners' cases before MSPB New York Region Presiding Official Joseph, the FAA moved for consolidation. Solerwitz opposed the consolidation*, but the FAA's motion was granted. Solerwitz's motions to compel discovery of necessary information in the FAA files regarding each petitioner before the same Presiding Official were *never decided.*

Although Solerwitz tried to obtain disclosure of individual facts essential to oppose the FAA's motion for consolidation and the adoption of the "lead" case methodology by the FCCA, he was prevented from doing so by a combination of no decision and adverse decisions from the MSPB on the discovery motions.

The denial of individual discovery by the MSPB prejudiced Solerwitz's ability to learn facts about each petitioner's case essential to oppose consolidation before the MSPB *or* the adoption of the "lead case" methodology by the FCCA.

The FCCA's April 15, 1986 decision/order fining Solerwitz *does not mention* his rigorous opposition to consolidation, or the denial of individual discovery by the MSPB (which left Solerwitz without facts essential to oppose consolidation or adoption of the lead case methodology). Instead, the FCCA decision/order makes it appear Solerwitz did *not oppose* consolidation or the lead case methodology.

At page 5 of its April 15, 1986 decision/order the FCCA said [*Appendix A,* p. A-5]:

> Solerwitz did not oppose or question the government's motion to suspend these ten appeals pending the decision in *Cecil.* We granted the motion *on*

**Appendix M* to this petition is a copy of Solerwitz's opposition to consolidation.

> *the basis of the government's statement that these cases were identical to Cecil.* By not opposing that motion or timely challenging the suspension, Solerwitz tacitly acquiesced in the government's view that the cases were identical.* [*emphasis added*]

Through delay and refusing to provide Solerwitz with information about individual petitioner's cases in response to the discovery requests during the MSPB proceedings the government prevented Solerwitz from obtaining facts necessary to oppose the government's allegation before the FCCA that the petitioners' cases were identical to *Cecil.* The FCCA then rewarded the government for non-disclosure of facts relevant to individual ATC appeals by holding the petitioners' appeals were identical to *Cecil* on the grounds that Solerwitz did not oppose that allegation.

Thus, the FCCA decision that these petitioners' appeals were identical to *Cecil* was *not* based upon review of the individual facts which the MSPB allowed the government to conceal during discovery. Rather, the finding of identity between petitioners' cases and *Cecil* is based upon Solerwitz's alleged default* in failing to oppose the implementation of the lead case methodology before the FCCA.

Solerwitz was unable to oppose the implementation of the lead case methodology without knowing the facts the government was allowed to conceal during discovery before the MSPB. The FCCA's not considering the MSPB's denial of essential discovery, and Solerwitz's efforts to obtain information was improper.

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*Not objecting to suspension of appeals is *not* acquiescence (tacit or otherwise) to the fact that appeals are *identical.* This specious reasoning exemplifies the FCCA's lack of essential judicial objectivity in the ATC cases. Suspension of appeals leaves the issue of whether the appeals are factually identical open for *future* determination as the FCCA had held in the "lead" case *Adams v. FAA,* 735 F.2d 488 at 494 (Fed. Cir. 1984).

The FCCA's finding that Solerwitz interposed a frivolous appeal based upon the finding he conceded the petitioners' appeals were identical to *Cecil,* and consented to implementation of the lead case methodology is concocted and designed to hide the fact that the government was *not* required to divulge facts Solerwitz needed to distinguish the petitioners' cases from *Cecil* and from one another. *Supra,* pp. 8-10.

Beyond making repetitive motions to obtain essential facts, and opposing consolidation Solerwitz had no control over the MSPB decisions to deny essential discovery, and to consolidate cases without knowing the facts in the government's file concerning the petitioners' individual cases. *Id.*

Solerwitz's representation was limited by the MSPB's decisions denying discovery of essential facts. Within the limitations set by the MSPB decisions Solerwitz's representation of the petitioners before the FCCA was *not* frivolous.

The FCCA's finding that Solerwitz did *not* oppose the lead case methodology is a second example of error which could have been avoided if criteria for determining whether an appeal is frivolous under FRAP 38 were developed.

3. *Additional Court Imposed Restrictions on Solerwitz's Representation of Individual ATCs.*

Solerwitz rigorous efforts to obtain essential facts about individual ATC cases were frustrated by the MSPB, and the MSPB's decisions were ignored by the FCCA as previously noted.

Assuming Solerwitz obtained individual facts concerning the circumstances of the petitioners' alleged participation in the August 1981 strike, other restrictions imposed by the FCCA's modifications of its appeals procedures prevented Solerwitz from incorporating those facts into his briefs.

a. *Lead Case Methodology.*

The "lead case methodology" was implemented by FCCA order dated February 24, 1983 (*Appendix N* to this Petition is the FCCA order of February 24, 1983.). The February 24, 1983 order was the first notice Solerwitz had that the lead case methodology would be implemented.

The February 24, 1983 order provided for the MSPB to select and decide five "lead cases" "on an expedited basis". The order also provided for the suspension by the Clerk of the FCCA of ". . . all pending petitions for review filed by Air Traffic Controllers . . . and to withhold docketing of any petition as an appeal." [*Appendix N*]

Petitioners' counsel was not advised of the criteria the MSPB or the FCCA utilized to select the lead cases.

Twenty-three months after the lead cases* were decided the FCCA lifted the suspension on the prosecution of the non-"lead case" appeals.

On May 18, 1984 (after the FCCA decisions on the lead cases) [*Appendix O* to this petition], and on December 10, 1984 [*Appendix P* to this petition] the FCCA issued warning notices to counsel regarding the prosecution of frivolous appeals. These notices were intended to discourage attorneys (such as Solerwitz) who represented other than lead case petitioners from continuing to prosecute appeals before the FCCA.

The December 10, 1984 Notice [*Appendix P* to this petition] also advised petitioners that further prosecution of their appeals after January 10, 1985 would depend upon their withdrawing any "present petition for review or fil[ing] a renewed petition."

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*The "Lead Cases" can be found in 735 F.2d 477-549.

In sum, the "lead case" methodology involved (1) suspending all appeals before the FCCA until the lead cases were decided, (2) issuing warning notices regarding frivolous appeals to discourage prosecution of appeals, and (3) requiring "new" filings of petitions for appellate review *after* the lead cases were decided.

Application of the lead case methodology to the petitioners' appeals prevented Solerwitz from affording greater individual attention to each petitioner's case in the briefs he submitted on their behalf to the FCCA. Solerwitz's participation in the lead case procedure (adopted *sua sponte* by the FCCA) was, of necessity, limited to "national" issues for which discovery was allowed by MSPB Chief Administrative Law Judge McCarthy's ACJ-1 "discovery order". (*Supra,* p. 8 and *Appendix J*), and general issues involving all ATC's. [*Appendix Q* is the contents page containing "Summary of Argument" in the *Biancamano* brief.]

b. *Application of the Lead Case Procedure in Adams v. FAA,* 735 F.2d 488 (Fed. Cir. 1984)

The ten petitions to review the MSPB decision to uphold discharges in this case were consolidated with other petitions in the case of *Adams v. Dept. of Transp., F.A.A.,* 735 F.2d 488 (Fed. Cir. 1984). [*Appendix A,* p. A-2]

The FCCA resolved all issues against *Adams.* It found that there were other petitioners (including these ten) whose appeals were consolidated with *Adams* in MSPB Docket No. NY 025281 F0424. [735 F.2d at 494]. Although the FCCA said "The issues in those appeals appear to have been considered and decided in this or another of the decisions handed down by the court today.", it gave the Petitioners the opportunity to continue with their individual appeals. [735 F.2d 494].

After certiorari was denied in the "lead cases", Solerwitz indicated his intent to further prosecute the appeals of these ten petitioners before the FCCA. The FCCA responded by letters (1) establishing a deadline for filing the briefs/appendices, (2) providing that the briefs must be addressed to issues not decided in the lead cases, and (3) warning about "the impropriety of frivolous appeals". [*Appendix R* to this petition is a letter dated December 10, 1984 regarding the *Brunner* appeal from the FAA to Solerwitz.]

c. *Application of the Lead Case Procedure and Summary Affirmance Based Upon Cecil v. FAA 767 F.2d 892 (Fed. Cir. 1985)*

Solerwitz filed ten separate briefs and a two volume Consolidated Appendix with the FCCA on behalf of these ten petitioners in accordance with the direction in *Adams*. [See e.g., *Appendix F*, pp. F-5 to F-33; *Appendix I*, pp. I-5 to I-16].

On February 26, 1985 the government moved for a suspension of the appeals of these ten petitioners pending the decision in *Cecil v. FAA* 767 F.2d 892 (Fed. Cir. 1985). [*Appendix A*, p. A-3]

Solerwitz's office received *no timely notice* of the government's motion to suspend hearing these ten petitioners' appeals pending the decision in *Cecil*. The *two days* between the making of the motion (February 26, 1985) and the FCCA decision (February 28, 1985) gave Solerwitz neither time to receive nor time to reply to the government's suspension motion. [*Appendix A*, p. A-3; *Appendix U infra* at asterisk p. 16]

On July 12, 1985 the FCCA decided the *Cecil, supra* case. [*Appendix A*, p. A-3]

In *Cecil* the FCCA held that Cecil's arguments regarding the adequacy of the FAA's time and attendance records (used to "prove" that Cecil was not at work during the strike) [767 F.2d 892] were without merit. The FCCA did *not* determine whether the FAA's time and attendance records for *Cecil* were adequate. Rather, it relied upon the finding *in another case, Dorrance v. FAA* 735 F.2d 516, where the FAA's records were held adequate to reject Cecil's contention.*

In *Cecil* the FCCA also rejected the petitioner's contention that the FAA's personnel records were "contradictory". Petitioner's contention was based on the conceded fact that the FAA's records did *not* indicate which shift the petitioner was supposed to work during the day of the strike. [767 F.2d 893, 894]. The FCCA relied upon the *Dorrance* holding that the FAA's records in the *Dorrance case were adequate,* and its finding that the "contradictory records contention" could not be raised on appeal** for the first time in Cecil. [*Id.*]

Without giving timely notice to Solerwitz's office, on August 7, 1985, the government moved for summary affirmance of these ten petitioners' cases based upon the FCCA's *Cecil* decision. *For a second time* Solerwitz's office received a copy of an FCCA decision granting a government motion (on this occasion for "substantive" summary affirmance of these ten petitioners' cases) *without* having been given adequate notice or time to respond.

The FCCA decision granting summary affirmance of the MSPB decision sustaining the FAA's discharges of

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*Since Cecil's records were different from Dorrance's the question regarding the adequacy of Cecil's FAA records could not be determined by relying upon *Dorrance.*

**The fact that the "contradictory records contention" illustrated Cecil's *contention before the MSPB* that the FAA's personnel records were inadequate to sustain the allegation that Cecil struck was overlooked by the FCCA when it made this finding. [See e.g., Appendix F, p. F9, items (2), (5) and (7)] these ten petitioners was dated August 14, 1985—*seven days* after the government's August 7, 1985 motion for summary judgment was made.*

In its April 15, 1986 decision/order finding Solerwitz the FCCA sought to justify its failure to give Solerwitz adequate notice of the government's motions to suspend and for summary affirmance on these petitioner's appeals finding respectively:

> Solerwitz did not oppose the motion, . . . [*Appendix A*, pp. A3, A4]

and,

> Solerwitz did not respond to the motion . . . [*Appendix A*, pp. A3, A4]

The impossibility of opposing or responding to motions which a party has no notice of was not considered by the FCCA when it fined Solerwitz.

d. *The FCCA's Decisions to Fine Solerwitz.*

In *Cecil* the FCCA recognized the validity of Solerwitz's appellate contentions, and attempted to rebut them through reasoning and precedent. *Supra* pp. 16-17 [767 F.2d 893, 894]. Nevertheless, it fined both Solerwitz and his client $500 "jointly and severally" for "filing and proceeding with a frivolous appeal" [*Id.*].

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*Summary affirmance is *not* a procedural motion which the FCCA clerk can "dispose of" when it ". . . is consented to or unopposed" FCCA Practice Rule 9 [*Appendix S* to this petition]. Seven days is inadequate notice of motion under FRAP 27(a) which applies to motions before the FCCA. *FCCA Procedural Handbook* p. 6, No. 16. [*Appendix T* to this petition]. FRAP 27(a) [*Appendix U* to this petition, p. U-3].

The government's August 7, 1985 motion for summary affirmance of these ten petitioners' appeals based upon *Cecil* contained *no request for attorneys' fees.*

On August 26, 1985 (following the FCCA's granting the government's August 7, 1985 summary affirmance motion on August 14, 1985) the government moved for reconsideration of the FCCA's August 14, 1985 order. At the suggestion of the FCCA Clerk the government requested that costs and attorney's fees be granted upon the reconsideration.

Solerwitz attempted to file substantive motions to vacate the FCCA's August 14, 1985 summary affirmance, and to reconsider the appeal no later than *September 5, 1985.* The FCCA *Clerk returned* Solerwitz's motions on September 24, 1985 ruling ". . . the points . . . raised were foreclosed against the movants when no objection was filed in opposition to respondent's motion to suspend proceedings in these cases, pending the decision in *Cecil* . . ., on the grounds that the cases were identical with *Cecil.*"*

The FCCA Clerk's unauthorized and unfair assistance to the government on the summary affirmance motion and assuming the position of the Court in rejecting Solerwitz's motions *were approved by the FCCA* in its April 15, 1986 decision/order fining Solerwitz. [*Appendix A*, p. A-8].

Although Solerwitz's motions were clearly timely as "opposition" to the government's August 26, 1985 motion for reconsideration (having been filed no later than September 5, 1985 within seven days after service under FRAP Rule 27 [*Appendix U,* p. U-2], the FCCA attempted to "rationalize" the unlawful actions of its Clerk by characterizing Solerwitz's motion as one for reargu-

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*There is *no authority* for the FCCA Clerk to rule on substantive motions in FCCA Practice Rule 9 "Unopposed Procedural Motions" [*Appendix S,* p.S-2]; FCCA Procedural Handbook item 16 "Motions" [*Appendix T,* p. T-2]; or FRAP Rule 27 [*Appendix U,* p. U-2].

ment [*Appendix A*, pp. A-7, A-8]. Since the government's motion was for reconsideration or reargument, Solerwitz's opposition properly requested relief for him as part of his opposition.

After allowing the government to file two more addenda to its August 26, 1985 motion for attorneys' fees, the FCCA further circumscribed Solerwitz's Fed. Cir. R.20 right to oppose the motion for attorney's fees by requiring him to respond under a deadline imposed by order to show cause [*Appendix A*, p. A-4].

Without comparing the facts involving these ten petitioners with the facts in *Cecil, supra,* the FCCA fined Solerwitz for costs and attorney's fees finding:

1. Solerwitz admitted these ten cases were "identical" to *Cecil* since Solerwitz did *not* oppose the government's motion to suspend the decision in these cases pending hearing and determination of *Cecil.* The imposition of fines was appropriate here since fines were imposed in *Cecil.*

2. Solerwitz "proceeded" with these appeals in bad faith, although the appeals were *not* filed in bad faith in 1983.

3. Solerwitz failed to distinguish these cases from *Cecil.*

4. Solerwitz could have distinguished these cases from *Cecil* even though he was denied the opportunity to learn distinguishing facts.

5. Solerwitz knew in February 1985 that the FCCA would rule in August 1985 that these cases were identical to *Cecil.*

6. Solerwitz was properly denied ten days to respond to the government's motion for summary affirmance under FRAP Rule 27(a).

7. Solerwitz's opposition papers to the government's motion for summary affirmance were properly returned by the FCCA Clerk.

8. The fact that neither punishment nor retribution would be effected by fining Solerwitz is *not* grounds to deny the imposition of penalties.

[*Appendix A*, pp. A-5 to A-9]

Petitioners' motion to stay the April 16, 1986 FCCA mandate fining Solerwitz pending certiorari consideration was temporarily granted by the FCCA on May 16, 1986 [*Appendix B*] and then denied on May 23, 1986 [*Appendix C*]. The FCCA denied petitioners' motion for a rehearing *en banc* of the decision to deny the stay application by decision dated June 5, 1986, and then Chief Justice Burger of this Court denied petitioners' motion for the same relief on May 30, 1986. [*Appendix E*]. Solerwitz subsequently paid the $5,000 fine to the government for the alleged prosecution of frivolous appeals on behalf of these petitioners.

REASONS FOR GRANTING WRIT.

I.

The lack of standards for determining whether an appeal is frivolous in FRAP Rule 38 renders the statute unconstitutional for vagueness or overbreadth.

FRAP Rule 38 is a punitive statute authorizing a court of appeals to award monetary fines and costs upon determining an appeal is "frivolous". The fines can be levied against the appellant and his counsel (as in *Cecil v. F.A.A.* 767 F.2d 892, 894), or just the appellate counsel (as the FCCA awarded against Solerwitz here, *Appendix A*, p. A-9).

Without standards to determine what make an appeal "frivolous" expressed either in the statute, or court rule or in an authoritative opinion from this Court, appellate counsel can only guess as to whether the filing or maintenance of an appeal in the federal courts of appeal will subject them and their clients to penalties.

Since the federal courts of appeal make the initial determination concerning whether to fine an appellant and/or appellate counsel for prosecuting a frivolous appeal under FRAP Rule 38, this Court is the only forum where appellate review of the decision imposing the fine can be obtained. In the exercise of its supervisory power under its Rule 17.1 over the federal judicial system this Court should consider standards for the types of presentations or conduct which constitute a frivolous appeal. With standards for frivolous appeals established by this Court neither appellants nor their counsel will be discouraged from proper participation in the appellate process.

Clarification of the criteria under which penalties can be assessed for counsel's conduct in federal litigation is an important issue to the public, the bench and the bar. In June 1986 the Federal Bar Council in New York City had to change auditoriums to accommodate those interested in a forum on this subject.

When considering the vagueness or overbreadth of FRAP Rule 38, this Court will have an opportunity to compare and clarify criteria for assessing costs and attorneys' fees under other federal statutes imposing penalites for improper conduct during federal litigation. See e.g., 28 U.S.C. §1927 (which gives federal Courts the power to award attorneys' fees incurred as a result of unreasonable and vexatious delay or multiplication of proceedings before it); 28 U.S.C §1912 (which gives this Court or the courts of appeals discretion to adjudge the prevailing party on an appeal "damages for . . . delay, and single or double costs"); this Court's Rules 50.1 - 50.7 concerning the assessment of "Costs"; and, Federal Rules of Civil Procedure 11 (which provides for sanctions if pleadings, motions, or other papers are *not* ". . . well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that [they are] not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.").

The "frivolous" standard in FRAP Rule 38 is distinguishable from the standard in ". . . 5 U.S.C. §7501(a), authorizing removal or suspension [of nonprobationary federal employees] without pay 'for such cause as will promote the efficiency of the service'." which was held to be neither vague nor overbroad in *Arnett v. Kennedy* 416 U.S. 134, 158-164 (1973).*

While the "frivolous" standard in FRAP Rule 38 is similar to the "cause" standard (in 5 U.S.C. §7501[a]) in

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**Arnett's* reasoning concerning vagueness and overbreadth remains viable. See e.g., *Cornelius v. Nutt* ____ U.S. ____, 53 U.S.L.W. 4837 at 4843 [citing *Arnett* in dissenting opinion] (1/7/85).

that both were intended to be generally applicable to a myriad of different situations, the "frivolous" standard was *not* applied in cases prior to its enactment (as was the "cause" standard considered in *Arnett* 416 U.S. 134, at 160). Furthermore, no administrative agency's Office of General Counsel is available to attorneys or appellants seeking advice on the interpretation of FRAP Rule 38 performing a function similar to that of the General Counsel to the Office of Economic Opportunity which was also referred to in *Arnett* 416 U.S. 134 at 160.

The "frivolous" standard in FRAP Rule 38 is vague considering that persons "of common intelligence must necessarily guess at its meaning and differ as to its application". *Connally v. General Construction Co.,* 269 U.S. 385, 391 (1926).

This case pointedly demonstrates the inability to reasonably anticipate what type of representation will be considered frivolous or what standards will be applied to make that determination. *None* of the eight findings the FCCA made when it fined Solerwitz in these cases (*Supra* pp. 18, 19) were considered in previous FRAP Rule 38 cases as indicia of frivolous appellate representation.

Previous cases interpreting FRAP Rule 38 suggest that sanctions for "frivolous" appeals are only to be imposed in extreme circumstances. In *Ruderer v. Fines,* 614 F.2d 1128, 1132 (7th Cir. 1980) sanctions were imposed against a plaintiff who appeared *pro se* and initiated multiple proceedings in state and federal courts over a fifteen year period against various government officials following his discharge from federal employment. The "self-styled" claims advanced on the appeal were rejected in several previous decisions. The Seventh Circuit held the appellant's complaints "frivolous, malicious, filed in bad faith and totally devoid of any semblance of colorable merit," and "filed with no serious intention of obtaining relief and solely for the purpose of harassment."

The Seventh Circuit in *Ruderer* said that sanctions should be imposed under FRAP Rule 38 only after a court makes *two* determinations, to wit [614 F.2d at 1132]:

> First, it must determine that the appeal is frivolous. "A frivolous appeal means something more to us than an unsuccessful appeal." *NLRB v. Lucy Ellen Cady Division* 517 F.2d 551, 555 (7th Cir. 1975). Second, the appellate court, in its discretion, must examine whether the appeal is an appropriate one for the imposition of a sanction.

In *Fluoro Electric Corporation v. Branford Associates,* 489 F.2d 320, 326 (2d Cir. 1973) the Second Circuit imposed sanctions under FRAP Rule 38 where the appellant ". . . prosecuted three appeals to this court. . . . In none of these appeals was there a pretense to any ground for appeal other than the claim that the judgment was against the wrong entity." The "critical question" according to the Second Circuit in FRAP Rule 38 cases ". . . is . . . whether the situation . . . is one of the *'highly unusual' circumstances* which permit the imposition of sanctions . . . because of a clear showing of bad faith." [*emphasis added*]

Analysis of FRAP Rule 38 cases indicates that they fall into categories according to the wrongdoing sought to be punished. (*Appendix V* to this Petition lists sanction cases according to Circuit.)

In the ATC cases the FCCA's application of FRAP Rule 38 to impose sanctions as a consistent practice when the Court finds no merit in an appellant's arguments indicates a departure from previous standards for determining whether an appeal is "frivolous." This departure results in unanticipated punishment of appellants and attorneys for their participation in the appellate process.

This Court's articulation of standards for determining whether an appeal is frivolous will reduce the uncertainty created by the FCCA's decision below.

II.

Consolidation and use of the "lead" case procedure by the MSPB and FCCA infringed the petitioner's due process rights.

As an "employee" under 5 U.S.C. §7511 (a)(1)(A) subject to "removal" under 5 U.S.C. §7512 (2) each petitioner was entitled to the due process rights specified in 6 U.S.C. §7513 and §7703. Thus, *each petitioner* had the right to representation by an attorney; to copies of "any supporting material" the agency relied upon in deciding to discharge the petitioner; to appeal the FAA decision to the MSPB; and, to appeal the MSPB decision to the FCCA.

Although each Petitioner specifically requested supporting information concerning the FAA's discharge decision [See e.g., F-21], this information was *not supplied* voluntarily or in discovery. *Supra* pp. 5-9. Consolidation and adoption of the lead case procedure by the MSPB and FCCA resulted in denial of the individual requests for supporting material in the FAA file essential to each petitioner's defense. *Supra* pp. 8-11.

Without information essential to the defense at the hearing level counsel could not make an adequate record on appeal.

Further denial of each petitioner's statutory due process right to appeal resulted from implementation of the "lead" case and summary affirmance procedures. By utilizing these procedures the FCCA avoided examining so much of the record as reflected facts unique to the circumstances surrounding each petitioner's removal by the FAA. *Supra* pp. 10-12.

Although each petitioner urged harmful procedural errors occurred in violation of his statutory due process rights as grounds for the FCCA to reverse his discharge (See e.g., *Amodeo* brief to the FCCA, pp. 7-9), the FCCA did *not decide these issues* in either of the lead cases. (*Adams,* 735 F.2d 488 or *Cecil,* 767 F.2d 892).

The suspension of each petitioner's appeal for 23 months while the 11 "Lead" cases were decided, and delays before hearing caused by the FAA were independent violations of the due process requirement that hearings be held "at a meaningful time." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965) as quoted in *Barry v. Barchi,* 443 U.S. 55 at 66 (1979). Lengthy delays of hearings in employment termination cases are especially disruptive for both the employer and employee.

The FCCA's discouraging the taking and rigorous pursuit of appeals by pre-appeal warnings and post-appeal fines infringed the right to appeal and to be represented by counsel upon the appeal.

In sum, at every critical stage of the proceedings following the PATCO strike these petitioners substantive and procedural statutory due process rights were infringed. Judicial consideration of these important rights should not be ignored as they were by the court below.

III.

Sanctions for improprieties by attorneys under FRAP Rule 38 should only be awarded in extreme or unusual circumstances upon a clear showing of bad faith, delay, relitigation of an issue, or interposition for an improper purpose such as to harass or needlessly increase the cost of litigation.

This Court faces docket control problems no less serious than the FCAA. Stern, Gressman, and Shapiro in *Supreme Court Practice (6th ed.)* make this observation at page 639:

> *Although the Court has not yet done so,* it possesses the power to award attorneys' fees incurred as a result of unreasonable and vexatious delay or multiplication of proceedings before it. 28 USC §1927.

In 1982, before the FCCA started imposing fines because it disagreed with appellants' contentions, its use of the FRAP Rule 38 sanction power was consistent with the restraint exercised by this Court and other federal circuits. Compare *Asberry v. U.S. Postal Service,* 692 F.2d 1378, 1382 (Fed. Cir. 1982) with cases at *Supra* pp. 22, 23 and in *Appendix V.*

The FCCA has now come full circle and assesses sanctions on a regular basis in ATC appeals even where the issues raised were concededly *not* decided in any of the "Lead" cases. See e.g., *Dawson v. FAA,* 769 F.2d 754 (Fed. Cir. 1985).

Sanctions function to punish and deter conduct considered undesirable. Freedom to present appellate argument in a professionally reasonable manner is essential to the appellate process. Liberal use of the FRAP Rule 38 sanction power infringes the freedom to present appellate argument, and discourages use of the appellate process.

Without standards to determine when an appeal is "frivolous" litigants will be subject to the whim of the federal circuit court. They will be subject to a Court's *ad hoc* interpretation of "frivolous" applied without adequate consideration of the appellate record for the improper purpose of discouraging appeals.

A standard which directs that the sanction power be used sparingly upon a clear showing of one or more of the circumstances delineated under III would help to alleviate the uncertainty which accompanies the undefined word "frivolous" in FRAP Rule 38.

In determining whether an appeal is "frivolous" a Court should also consider (1) the difficulty presented by the facts and the law, and practical problems in management of the litigation, and (2) constraints upon appellate counsel imposed by adverse decisions below (i.e. inability to obtain essential facts because of adverse discovery rulings).

IV.

Petitioners' appeals were not frivolous.

The FCCA avoided examination of the petitioners' appellate records by finding Solerwitz admitted they were identical to *Cecil.*

The FCCA also did not address issues raised in the Petitioners' briefs which explained why additional facts regarding each appeal were not included (i.e. harmful procedural error prevented appellant's counsel from learning more facts).

Solerwitz representation of the petitioners was hindered by adverse agency and court determinations over which he had no control. It was, nevertheless, adequate, not interposed for an improper purpose, in bad faith, to foster delay or to increase the cost of litigation.

Conclusion.

To clarify and guide the bench and the bar in the delicate area of imposing sanctions for improper conduct in the prosecution of a federal appeal, this petition for certiorari should be granted.

Respectfully submitted,

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July 15, 1986

Appendix A—*Amodeo v. F.A.A.* ___ F.2d ___ (Fed. Cir. 4/15/86) Decision Order Fixing Sanction $5,000.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

◆

WILLIAM A. AMODEO, RONALD R. BLANCHARD, BRUCE R. BONACUM, JOHN C. BUCHANAN, RICHARD T. BURNS, KENNETH W. CARPENTER, CHARLES J. CONTINO, CHARLES [illegible], [illegible] E. [illegible], JAMES F. FISHMAN,

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondent.

Appeal Nos. [illegible]

◆

Before FRIEDMAN, Circuit Judge, MILLER, Senior Circuit Judge, and NIES, Circuit Judge.

[illegible] representations [illegible] the petitioner [illegible] hindered [illegible] and [illegible] were clearly [illegible] and [illegible]. It was, [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible].

CONCLUSION

[illegible] the petition for a writ of certiorari should be granted.

Respectfully submitted,

[illegible]
[illegible]
[illegible], N.Y. [illegible]
[illegible]
Counsel for [illegible]

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[illegible]

[illegible]

Appendix A—*Amodeo v. F.A.A.* ____F.2d ______(Fed. Cir. 4/15/86) Decision/Order Fining Solerwitz $5,000.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

◆

WILLIAM A. AMODEO, ROBERT A. BIANCAMANO, BRUCE R. BONACUM, JOHN C. BRUNNER, RICHARD G. BURNS, KENNETH M. CARLSTROM, CHARLES J. CONTEGNI, CHARLES DARCY, WAYNE E. ENNIS, JAMES J. FINNEGAN,

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondent.

Appeal Nos. 83-1162, 83-1163, 83-1164, 83-1165, 83-1166, 83-1167, 83-1169, 83-1170, 83-1171, 83-1172.

◆

Before Friedman, Circuit Judge, Miller, Senior Circuit Judge, and Nies, Circuit Judge.

ORDER

In this order we grant the motion by the respondent Federal Aviation Administration to award it attorney fees against Jack B. Solerwitz, the petitioners' counsel.

BACKGROUND

Jack B. Solerwitz ("Solerwitz") is counsel for the ten petitioners named in the caption. He also was counsel for the petitioner in *Cecil v. Department of Transportation, FAA*, 767 F.2d 892 (Fed. Cir. 1985). The eleven petitioners challenged their removal by the Federal Aviation Administration ("FAA") from their positions as air traffic controllers for participation in the 1981 illegal strike.

In June, 1983, Solerwitz filed eleven separate, although virtually identical, petitions to review and supporting briefs. He challenged a decision of the Merit Systems Protection Board ("MSPB") that upheld the removals. The FAA, represented by the Department of Justice ("Justice"), filed a separate brief in each appeal. This court considered these eleven petitions when it decided the consolidated case of *Adams v. Department of Transportation, FAA*, 735 F.2d 488 (Fed. Cir.), *cert. denied sub nom. Schapansky v. Department of Transportation, FAA*, 105 S. Ct. 432 (1984). (The board had consolidated and decided in a single opinion the eleven petitions as well as others not at issue in this appeal. *Adams v. Department of Transportation*, 15 M.S.P.R. 72 (1983).)

In *Adams*, the court affirmed the MSPB decisions sustaining the removals. It stated that, although the issues raised in these eleven cases appeared to have been decided, the petitioners could prosecute further their individual appeals. It warned that this court's decision in *Asberry v. United States Postal Service*, 692 F.2d 1378 (Fed. Cir.

1982), governs prosecution of frivolous appeals. Adams, 735 F.2d at 494. Each of the ten petitioners in this case, and Cecil, continued the prosecution of his appeal.

In February, 1985, Solerwitz filed separate supplemental briefs, again virtually identical, on behalf of the eleven former controllers. On February 26, 1985, Justice moved to suspend proceedings in these ten cases pending a decision in *Cecil*. It argued that

> [a]ll of these cases were consolidated together [at the MSPB]; thus the evidence submitted with respect to each case is identical and the arguments made by counsel on appeal here are identical. Under the circumstances, it would be a needless waste of our resources to file identical briefs in these cases and a needless waste of the Court's resources to consider each case individually.

The court granted the motion on February 28, 1985. Solerwitz did not oppose the motion, or seek timely reconsideration of the order granting it. In the Clerk's records, the certificate of service of that order contains the handwritten notation "2/28/85 No objection by petitioner."

We decided *Cecil* on July 12, 1985, and the mandate issued on August 5, 1985. We stated that "[a]ll of the arguments raised by petitioner in his briefs at this stage have been addressed by the MSPB and this court previously," 767 F.2d at 893. We assessed costs and attorney fees of $500 against Cecil and Solerwitz, jointly and severally, for prosecuting a frivolous appeal. Solerwitz did not file a petition for reconsideration by the panel or for rehearing *in banc*.

On August 7, 1985, more than three weeks after we decided *Cecil*, Justice moved for summary affirmance in these ten cases on the basis of its February motion to suspend and requested assessment of costs and attorney fees on the ground that these appeals were frivolous. It repeated the reasoning of its motion to suspend. Solerwitz did not respond to the motion, and we granted summary affirmance on August 14, 1985.

On August 26, 1985, Justice moved this court to reconsider its August 14 order to award it the costs and attorney fees it had requested in its August 7 motion. On September 5, 1985, Solerwitz filed a motion to vacate the summary affirmance and to reconsider the appeal. The motion was returned to him on September 24, 1985, on the ground that the points he raised "were foreclosed against the movants when no objection was filed in opposition to respondent's motion to suspend proceedings in these cases, pending the decision in *Cecil* . . ., on the grounds that the cases were identical with *Cecil.*"

Justice filed two addenda to its motion to award costs. Following the second filing, this court ordered Solerwitz to show cause why he should not be assessed attorney fees and costs in each of these cases. *See* Fed. Cir. R. 20. Solerwitz filed a timely opposition on January 7, 1986.

DISCUSSION

Solerwitz's pursuit of the appeals in these ten cases is just as frivolous as his appeal in *Cecil*, which we held to be frivolous and in which we assessed costs and attorney fees.

Solerwitz did not oppose or question the government's motion to suspend these ten appeals pending the decision in *Cecil.* We granted the motion on the basis of the government's statement that these cases were identical to *Cecil.* By not opposing that motion or timely challenging the suspension, Solerwitz tacitly acquiesced in the government's view that the cases were identical.

When we affirmed in *Cecil*, it therefore followed that we also would affirm in these cases. Solerwitz, however, did not promptly withdraw these appeals, or even timely oppose the government's motion for summary affirmance, which was filed more than three weeks after we decided *Cecil*. In the circumstances, there was no possible justification for his continued pursuit of these appeals.

The various grounds upon which Solerwitz seeks to avoid the assessment of costs and attorney fees against him are unpersuasive.

1. Solerwitz attempts to distinguish his prosecution of these appeals from those that this court has determined to be frivolous on the ground that these appeals were not "filed" in bad faith in 1983. In *Asberry*, however, we pointed out that "a frivolous appeal filed or proceeded with in this court will result in imposition of damages and costs upon appellant and counsel . . . ." 692 F.2d at 1382. *Asberry* was brought to Solerwitz's attention when he pursued these appeals.

2. Solerwitz states in an affidavit submitted with his Opposition:

> Whether or not Mr. Cecil struck the FAA has no bearing whatsoever on whether these petitioners struck the FAA. There is no allegation, much less any proof, that the employees acted jointly or even similarly. Your deponent, as petitioner's counsel, did not know and could not possibly have known that the Court would deem the cases identical. Respondent's statement in its motion that, because the M.S.P.B. wrote a consolidated decision, "thus the evidence submitted with respect to each case is identical" is absurd; respondent specifically relies

> upon different specifications in its charges of misconduct, and the voluminous Appendix presents wholly different evidence with respect to the acts of each petitioner and the scanty agency records thereof.

Solerwitz, however, never attempted timely to answer or refute the government's statement in its motion to stay that these cases were identical to *Cecil*. He made no effort in his briefs to distinguish these ten cases from previously decided cases or from each other until Justice filed its request for fees. Solerwitz' argument that he "did not know and could not possibly have known that the Court would deem the cases identical" when it summarily affirmed these appeals in August, 1985, is contradicted by the actual course of events.

3. Solerwitz argues that "due to the procedural uniqueness of these appeals, the petitioners have never had an opportunity to present their proof of merit to the appeal, or even to submit papers opposing summary affirmance!" In his affidavit, he contends that "[t]he Court thus flatly denied petitioners any opportunity to show how their cases differed from *Cecil*." Once again, his contention founders upon the facts. He filed two briefs for each petitioner, one in 1983 and the other in 1985. He knew in February, 1985, that *Cecil* would control these cases, but the first time he asserted that the cases are distinguishable was in his opposition to the assessment of costs and attorney fees filed in January, 1986.

4. Solerwitz contends that, as "prescribed by law," he should have been permitted ten days in which to respond to Justice's motion for summary affirmance in August, 1985. Rule 27(a) of the Federal Rules of Appellate Pro-

cedure entitles any party to file an opposition to a motion for a nonprocedural order within seven days after service of the motion. The motion was filed on August 7 and granted on August 14. Solerwitz never attempted to file any opposition or request additional time to respond, and never sought reconsideration on the ground that he had not been given sufficient time to respond. Indeed, he has not indicated what he would have shown in an opposition that, considering all the circumstances, would have been likely to have caused denial of summary affirmance.

5. Solerwitz complains that his motion to vacate the summary affirmance was

> rejected by the Clerk for filing on the sole ground that the matter had already been addressed by the Court! This astounding refusal to perform a ministerial task constitutes the first time your deponent has ever heard of an act so prejudicial as the refusal of a Clerk to accept for filing, on the basis of his impression as to its merits, a document conforming to Court rules.

The Clerk's letter of September 24, 1985, returning the motion to Solerwitz, explained:

> The matters set forth in these motions were foreclosed against the movants when no objection was filed in opposition to respondent's motion to suspend proceedings in these cases, pending the decision in [*Cecil*], on the grounds that the cases were identical with *Cecil*.

In other words, the motion was treated as an attempt to reargue a matter that long since had been laid to rest. If the motion be viewed as a petition to reconsider the summary affirmance, it was untimely because it was not filed within 14 days of that action, as Rule 40 of the Federal Rules of Appellate Procedure required. Solerwitz's motion was filed on September 5, 1985, 22 days after this court granted summary affirmance on August 14, 1985.

6. Finally Solerwitz asserts:

> In short, it is grossly unfair to sever the *Adams* case and then to levy penalties in only some of the resulting fragments—utterly without respect to which of them were most meritorious. Likewise, the good faith of petitioners' counsel—as well as the assumption of the impartial observer—is undeniable in light of near-universal astonishment at the reinstatement of only a very few of thousands of air traffic controller appellants. No aim of punishment, either deterrence or retribution, can be furthered by imposing a damages award now.

This hyperbolic plea for mercy totally ignores all that has gone before. For the reasons we have given, Solerwitz's excuses and explanations do not justify his pursuit of the frivolous appeals in these cases. His contentions either ignore the course of the proceedings or rest upon factual assumptions that the record does not support.

An award in the nature of a penalty of costs and attorney fees is therefore appropriate. *See* Notes of Advisory Committee, Fed. R. Civ. P. 38. Since Solerwitz obviously is the person responsible for what took place, the award will be made solely against him, and not against him and his clients, as was done in some other cases, one such as *Cecil*.

Accordingly, IT IS ORDERED:

(1) Justice's motion for the award of attorney fees and costs is granted.

(2) Costs and attorney fees are awarded against Jack B. Solerwitz personally in favor of the Department of Justice of $500 in each of these ten cases, for a total of $5,000.

(3) Solerwitz shall pay this amount to the Department of Justice by 5:00 p.m. (EST), May 16, 1986.

(4) Solerwitz shall notify the court within ten (10) days of making such payment.

Dated: April 19, 1986

FOR THE COURT

DANIEL M. FRIEDMAN
Circuit Judge

Filed
U.S. Court of Appeals for
The Federal Circuit
Apr. 16, 1986
FRANCIS X. GINDHART
Clerk

Appendix B—*Amodeo v. F.A.A.* ____F.2d ____ (Fed. Cir. 5/16/86) Decision/Order Temporarily Staying Fines Set in Decision/Order of April 15, 1986.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

◆

WILLIAM A. AMODEO, *et al.*,

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondents.

Appeal Nos. 83-1162, 83-1163, 83-1164, 83-1165, 83-1166, 83-1167, 83-1169, 83-1170, 83-1171, and 83-1172.

◆

ORDER

On consideration of the application to stay the mandate, IT IS;

ORDERED that the provision contained in the order of April 15, 1986, directing Jack B. Solerwitz, Esq., to pay certain amounts to the Department of Justice by 5 p.m. (EST), May 16, 1986, is stayed pending further order of the Court.

Date 5/16/86
Washington, D.C.

FOR THE COURT

FRANCIS X. GINDHART
Clerk

cc: Jack B. Solerwitz, Esq.
Leonard W. Krouner, Esq.
Sandra P. Spooner, Esq.

Filed
U.S. Court of Appeals For
The Federal Circuit
May 16, 1986
FRANCIS X. GINDHART
Clerk

Appendix C—*Amodeo v. F.A.A.* ____F.2d ____(Fed. Cir. 5/23/86) Decision/Order Dissolving Temporary Stay Granted in Decision Dated May 16, 1986.

Note: This order will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

◆

WILLIAM A. AMODEO, ROBERT A. BIANCAMANO, BRUCE R. BONACUM, JOHN C. BRUNNER, RICHARD G. BURNS, KENNETH M. CARLSTROM, CHARLES J. CONTEGNI, CHARLES DARCY, WAYNE E. ENNIS, JAMES J. FINNEGAN,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondent.

Appeal Nos. 83-1162, 83-1163, 83-1164, 83-1165, 83-1166, 83-1167, 83-1169, 83-1170, 83-1171, 83-1172.

◆

Before Friedman, Circuit Judge, Miller, Senior Circuit Judge, and Nies, Circuit Judge.

ORDER

The petitioners are ten former air traffic controllers who were removed from their positions for participation in the August 1981 illegal air traffic controllers strike, which removals this court upheld. They seek a stay or recall of this court's mandate implementing this court's order of April 15, 1986, pending the filing and final determination of a petition for a writ of certiorari to review that order. The order awarded counsel fees and costs against the petitioners' counsel, Jack B. Solerwitz, personally, of $500 in each of the ten cases in this court (a total of $5,000) in which each petitioner challenged his removal. The fees and costs were awarded because of our conclusion that the appeals were frivolous. On May 16, 1986, we stayed the provision requiring Mr. Solerwitz to pay that amount to the Department of Justice by 5 p.m., on May 16, 1986, pending further order of the court.

Upon consideration of the application to stay or recall the mandate, which also may be viewed as an application to stay our order of April 15, 1986, we conclude that a stay should not be granted because Mr. Solerwitz has not made a sufficient showing to justify a stay.

He does not show, or even contend, that the payment of the attorney's fees and costs prior to the filing of a petition for a writ of certiorari would subject him personally to irreparable injury. His only claim of irreparable injury is that "permitting an unjustified punishment for the exercise of a constitutional right to become effective" would have a "deterrent effect . . . upon the exercise of the constitutional right in contemporaneous and future cases." This generalized claim of irreparable injury does not warrant a stay. Moreover, Mr. Solerwitz has not shown any reasonable likelihood of success on the merits of this case, *i.e.*, that four Justices of the Supreme Court would be likely to grant a petition for certiorari seeking review of our April 15, 1986 order imposing sanctions for filing and pursuing frivolous appeals.

Accordingly, IT IS ORDERED:

1. The application to stay or recall our mandate or to stay our order of April 15, 1986, is denied.

2. Our order of May 16, 1986, staying the requirement of our order of April 15, 1986, that Mr. Solerwitz pay the $5,000 to the Department of Justice by 5 p.m., on May 16, 1986, is dissolved.

3. Jack B. Solerwitz personally shall pay the $5,000 in attorney's fees and costs to the Department of Justice by 5 p.m., on May 30, 1986, and shall notify the court within ten days of making such payment.

Date May 23, 1986

FOR THE COURT

DANIEL M. FRIEDMAN
Circuit Judge

cc: Jack B. Solerwitz, Esq.
Sandra P. Spooner, Esq.

Filed
U.S. Court of Appeals For
The Federal Circuit
May 23, 1986
FRANCIS X. GINDHART
Clerk

Appendix D—*Amodeo v. F.A.A.* ____ F.2d ____ (Fed. Cir. 6/5/86) Decision/Order Denying Suggestion for a Rehearing in banc.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

◆

WILLIAM A. AMODEO, ROBERT A. BIANCAMANO, BRUCE R. BONACUM, JOHN C. BRUNNER, RICHARD G. BURNS, KENNETH M. CARLSTROM, CHARLES J. CONTEGNI, CHARLES DARCY, WAYNE E. ENNIS, JAMES J. FINNEGAN,

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondent.

Appeal Nos. 83-1162, 83-1163, 83-1164, 83-1165, 83-1166, 83-1167, 83-1169, 83-1170, 83-1171, 83-1172

◆

ORDER

A suggestion for rehearing in banc having been filed in this case.

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc is declined.

Date 6/5/86

FOR THE COURT

FRANCIS X. GINDHART
Clerk

cc: Mr. Jack B. Solerwitz
Ms. Sandra P. Spooner, DOJ

Appendix E—*Amodeo v. F.A.A.* ____U.S.____ (5/30/86) Decision/Order Denying Stay Pending Certiorari Consideration.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D.C. 20543

Joseph F. Spaniol, Jr.,
Clerk of the Court

Area Code 202
479-3011

June 2, 1986

Jack B. Solerwitz, Esquire
c/o Leonard W. Krouner, Esquire
170 Old Country Road, Suite 310
Mineola, NY 11501

Re: William A. Amodeo, et al. v. Department of Transportation, Federal Aviation Administration, A-914

Dear Mr. Solerwitz:

Your application for a stay pending appeal in the above-entitled case has been presented to the Chief Justice, who has endorsed thereon the following:

"Denied
WEB
5/30/86"

Very truly yours,

JOSEPH F. SPANIOL, JR.
Clerk

By

EDWARD L. TURNER, JR.
Assistant Clerk

vjr

cc: Hon. Charles Fried, Solicitor General

Appendix F—Procedural History of Each Petitioner's Case and Selected Documents From Combined Appendix to FCCA.

Amodeo

8/6/81	Proposed notice adverse action
8/10/81	Request for extension of time to file written response
8/12/81	Denial of request for extension
8/13/81	Response to proposed removal notice
8/19/81	Decision to remove effective 8/22
9/2/81	MSPB form filed (received 8/27)

Biancamano

8/12/81	Proposed notice adverse action
8/14/81	Request for extension of time to file written response
8/18/81	Denial of request for extension
8/14/81	Response to proposed removal notice
8/25/81	Decision to remove effective 8/28/81
9/2/81	MSPB form filed (received 9/8/81)

Bonacum

8/8/81	Proposed notice adverse action
8/13/81	Request for extension of time to file written response
8/15/81	Denial of request for extension
8/14/81	Response to proposed removal notice
8/21/81	Decision to remove effective 8/24/81
9/2/81	MSPB form filed (received 9/8/81)

Brunner

8/7/81	Proposed notice adverse action
8/12/81	Request for extension of time to file written response
8/13/81	Denial of request for extension
8/14/81	Response to proposed removal notice
8/20/81	Decision to remove effective 8/23/81
9/2/81	MSPB form filed (received 9/8/81)

Burns

8/6/81	Proposed notice adverse action
8/10/81	Request for extension of time to file written response
8/12/81	Denial of request for extension
8/13/81	Response to proposed removal notice
8/19/81	Decision to remove effective 8/22/81
9/2/81	MSPB form filed (received 9/8/81)

Carlstrom

8/12/81	Proposed notice adverse action
8/17/81	Request for extension of time to file written response
8/19/81	Denial of request for extension
8/17/81	Response to proposed removal notice
8/25/81	Decision to remove effective 8/28/81
9/2/81	MSPB form filed (received 9/8/81)

Cecil

8/6/81	Proposed notice adverse action
8/10/81	Request for extension of time to file written response

8/13/81	Denial of request for extension
8/13/81	Response to proposed removal notice
8/19/81	Decision to remove effective 8/22/81
9/2/81	MSPB form filed (received 9/8/81)

Contegni

8/8/81	Proposed notice adverse action
8/13/81	Request for extension of time to file written response
8/15/81	Denial of request for extension
8/14/81	Response to proposed removal notice
8/21/81	Decision to remove effective 8/24/81
9/2/81	MSPB form filed (received 9/8/81)

Darcy

8/10/81	Proposed notice adverse action
8/13/81	Request for extension of time to file written response
8/15/81	Denial of request for extension
8/14/81	Response to proposed removal notice
8/24/81	Decision to remove effective 8/27/81
9/2/81	MSPB form filed (received 9/8/81)

Ennis

8/8/81	Proposed notice adverse action
8/12/81	Request for extension of time to file written response
8/13/81	Denial of request for extension
8/13/81	Response to proposed removal notice
8/21/81	Decision to remove effective 8/24/81
9/2/81	MSPB form filed (received 9/8/81)

Finnegan

8/19/81	Proposed notice adverse action
8/25/81	Request for extension of time to file written response
8/28/81	Denial of request for extension
8/25/81	Response to proposed removal notice
9/1/81	Decision to remove effective 9/4/81
9/2/81	MSPB form filed (received 9/8/81)

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

Appeal Nos.: 83-1162, 83-1163, 83-1164, 83-1165, 83-1166, 83-1167, 83-1168, 83-1169, 83-1170, 83-1171, 83-1172

◆

WILLIAM A. AMODEO,
Petitioner,
BRUCE R. BONACUM,
Petitioner,
RICHARD G. BURNS,
Petitioner,
WILLIAM F. CECIL,
Petitioner,
CHARLES E. DARCY,
Petitioner,
JAMES J. FINNEGAN,
Petitioner,
ROBERT BIANCAMANO,
Petitioner,
JOHN C. BRUNNER,
Petitioner,
KENNETH M. CARLSTROM,
Petitioner,
CHARLES J. CONTEGNI,
Petitioner,
WAYNE ENNIS,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

◆

COMBINED APPENDIX

Volume I (pp. 1-446)

SOLERWITZ, SOLERWITZ & LEEDS
Attorneys for Petitioners
170 Old Country Road
Mineola, New York 11501
(516) 742-4300

MERIT SYSTEMS PROTECTION BOARD

APPEALS FORM

The purpose of this form is to help you provide valuable information to the Merit Systems Protection Board ("the Board") when you file an appeal. You are *not* required to use this form, and you are not limited to answering the questions on the form if you feel there is other information you wish to provide. However, if you do not use the form, your appeal documents must comply with the Board's regulations. Your agency's personnel office can assist you in obtaining these regulations, and the Board advises you to review them.

All appellants who elect to use this form should complete Parts I-III. Only those who are appealing Reduction-in-Force (RIF) actions are required to complete Part IV.

Privacy Act Statement: This form requests personal information which is relevant and necessary to reach a decision in your appeal. The Merit Systems Protection Board collects this information in order to process appeals under its statutory and regulatory authority. Since your appeal is a voluntary action you are not required to provide any personal information in connection with it. However, failure to supply the Merit Systems Protection Board with all the information essential to reach a decision in your case could result in the rejection of your appeal.

The decisions of the Merit Systems Protection Board on appeal are final administrative decisions and, as such, are available to the public under the provisions of the Freedom of Information Act. Some information about your appeal will also be used in depersonalized form as a data base for program statistics. If there is a need to disclose information from your appeal file for reasons other than these, or those cited in the Privacy Act (5 U.S.C. 552a) or as required by the Freedom of Information Act (5 U.S.C. 552), your prior written consent will be obtained.

PART I: General*

1. Your Name: Biancamano Robert

2. Your Social Security Number: 079-36-0272

3. Your Present Address: Robert Biancamano Street No: 64 Mainsail Dr. City: Patchogue State and Zip Code: New York 11772

4. Home Phone (including area code): None

5. Office Phone (including area code): (516) 289-9852

PART II: Action Taken

6. Briefly describe the agency action you wish to appeal and attach any relevant documents. Adverse action resulting in removal

(a) Agency taking action: FAA/DOT

---

*In filling out this form, wherever the space provided is insufficient you may add additional pages. If you do so, please put your name and Social Security number at the top of the page, and indicate by number which question you are answering.

(b) Bureau (Division) within Agency: Air traffic division

(b) Have you filed a discrimination complaint with your agency or any other agency?

Yes ____ No X

PART III: Hearing

14. You have a right to a hearing on this appeal. If you do not want a hearing, the Board will make its decision on the basis of the documents you and the agency submit. Do you want a hearing?

Yes X No ____

If you choose to have a hearing, the Board will notify you when and where it is to be held.

15. You have the right to designate someone to represent you on this appeal if he/she agrees to do so. This person does not have to be an attorney. The agency has a right to challenge your choice of a representative if there is a conflict of interest or position. You may change your designation of a representative at a later date, if you so desire, but must notify the Board promptly of any change.

"I hereby designate to serve as my representative during the course of this appeal. I understand that my representative is authorized to act on my behalf."

Your signature Robert Biancamano

Date: 9-2-81

Signature of representative: Michael A. DiGiovanni

President, PATCO, P.O. Box 398, Bohemia, N.Y. 11715, Phone 289-9852

16. You may be permitted to call witnesses at a hearing upon the approval of the presiding official. If you intend to do so, provide their names and a brief statement of their relationship to the case. You will be permitted to request other witnesses later if you do not list them now.

(a) Name: Relationship to case: List of witnesses to be provided at a later date

To whom it may concern:

The following is supplemental information to go with the MSPB appeal already filed:

reference Question 11,* please add the following:

1. There is no meaningful opportunity for a hearing.

2. There has been a failure to grant access to documents and information relied upon by the agency in imposing discharge.

3. There has been insufficient notice of dismissal.

4. My dismissal constitutes a prohibited personnel practice.

5. There has been no proof of my participation in a strike.

6. The penalty assessed is inappropriate.

7. I was denied access to material necessary to present for defense.

---

*Question 11 was "Why do you think the agency was wrong in taking this action?" Explain briefly.

8. The facts and circumstances of my case have not been considered on their individual merits.

I would also like to add the following two paragraphs:

"I wish to take full advantage of my rights to discovery. This is advance notice of this need, so as to minimize any adverse effect on the efficiency of the proceedings.

I request that my appeal receive sensitive care, including confidentiality of the records, independent handling of the case, because it involves the allegation of a felony."

DEPARTMENT OF TRANSPORTATION

FEDERAL AVIATION ADMINISTRATION

Date:

In Reply Refer To: ZNY-1

Subject: Letter of Commendation

To: ATC: R. Biancamano

I wish to commend you for your outstanding performance during the Canadian Controllers strike.

Your efforts helped us to successfully handle a daily traffic volume from 50% to 100% greater than that normally experienced. Additionally, you were required to meet the challenge of new procedures and routes while assimilating this additional heavy workload.

Your performance reflects creditably on yourself and the New York Center.

Attached is a letter from the Chief, Air Traffic Division, EA-500, commending your professionalism and demonstrated pride in your chosen profession. I forward this recognition to you with sincere thanks for your efforts during this trying period.

A copy of this letter will be placed in your official personnel file.

Original Signed By
Billie H. Vincent
BILLIE H. VINCENT
Facility Chief
New York Center

Attachment

cc: EA-540
EMF
3400 w/basic ltr & attach
EA-10
Read

Sep 13 1976

T/S A. Riley, 6F

Letter of Commendation

R. Biancamano, Crew 3F
R. Siegmund, Crew 3F

On June 21, 1976, during the period 1900 to 01502, you gentlemen were assigned track "R" and "S" controllers. These tracks were established as a part of the New York Center Contingency plan caused by the CATCA action. Traffic normally routed through the Cander and Moncton Centers was rerouted into our North Atlantic airspace, bringing to you an increased workload of communications, clarification and the almost impossible task of maintaining and improving the separation of those aircraft under your control. Even though you were relieved, you both returned after your break, to assist copying positions, making suggestions and just being present.

In addition to our Facility Chief's appreciation, I thank you for a "maximum effort" for a job-well-done during a most trying period.

A copy of this letter will be placed in your official personnel folder.

ARTHUR RILEY
TSIC 1500-2300 6/21/76

A. Riley/jb/3444/9/13/76
cc: AEA-14

MERIT SYSTEMS PROTECTION BOARD
New York Regional Office
New Federal Building
26 Federal Plaza
New York, New York 10007

October 16, 1981

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Federal Aviation Administration
Chief, Personnel Management Division
Attention: AEA-16
Eastern Region—Federal Building
John F. Kennedy International Airport
Jamaica, New York 11430

Re: Appellants Named in
Attached List

F13

ORDER TO PRODUCE AGENCY FILE

The parties named in the attached list or their representatives have filed petitions for appeal with this office. You are hereby ordered to furnish us with an original and one copy of the material listed in the attached scheduled and to serve two copies as instructed in the enclosed Order Waiving Service Requirements. This material and any additional response, with supporting evidence, to material issues raised by the appellant which you wish to present must be forwarded to this office and served within fifteen (15) calendar days after you receive this letter. Material may be forwarded by certified mail and/or hand delivered within this time period.

As this order imposes a time limit of 15 days to provide copies of the records, please be advised that the consequence of failure to comply may be imposition of sanctions under 5 C.F.R. 1201.43.

If the appellant has requested a hearing, the presiding official who will decide the case will conduct a hearing approximately two to four weeks after receipt of your response to this letter. If the appellant has waived a hearing, the presiding officials will adjudicate the case on the record after providing the parties the opportunity to file written submissions.

It is the policy of the Merit Systems Protection Board to complete action on an appeal within 120 calendar days after the petition for appeal is received.

It is also the policy of the Board to decline any request for a continuance of a hearing or for an extension of time within which to submit evidence and argument unless the request is supported by an affidavit showing good cause for granting the continuance or extension.

The Board requires that the parties designate their representatives, if any, in writing. If the agency has not already designated its representative, it must notify this office immediately in writing of the name, address, and telephone number of the person authorized to appear in behalf of the agency, and serve copies of the notice in accordance with the Order Waiving Service Requirements. A "Designation of Agency Representative" form is enclosed for your convenience. All communications will be directed to your office until a designation of an agency representative is served.

All communications with this office or presiding officials must be in writing. Representatives of the Board will not accept or initiate *ex parte* communications concerning the merits of the case with any party. Failure of the party who makes an unauthorized *ex parte* communication to observe these procedures may result in (1) disqualification from further participation in these proceedings, or (2) an adverse ruling against that party.

The Board's regulations are found in Title 5, Code of Federal Regulations, Part 1201. We urge all parties to review the regulations for detailed information on the practices and procedures followed by the Board in processing an appeal.

For the Board:

JOAN M. DOLAN
Acting Regional Director

Enclosures:
  Schedule
  Designation of Agency Representative Form
  Letter to appellant's representative acknowledging appeal
  One copy of appellant's submissions for each appellant
  Order Waiving Service Requirements

cc:

Appellant's Representative

Department of Transportation
FEDERAL AVIATION ADMINISTRATION
Eastern Region
Federal Building
John F. Kennedy International Airport
Jamaica, New York 11430

November 29, 1981

Ms. Joan M. Dolan
Regional Director
Merit Systems Protection Board
New York Regional Office
26 Federal Plaza
New York, NY 10278

Re: Appeal of Amodeo, William A

Dear Ms. Dolan:

The following is furnished in four (4) certified true copies corresponding sequentially with Schedule 10 of your request.

1. Not applicable.

2. Not applicable.

3. Appellant was in the competitive service and had completed the required one year probationary period.

4. Notice of Proposed Removal.

5. Appellant's written reply, if any.

6. Summary of oral reply, if any.

7. Notice of Decision to Remove.

8. Standard Form 50 effecting removal.

9. Appellant was served with both notices by regular mail and certified mail. Copies of mail controls are shown with the notices under items 4 and 7.

10. Appellant was Absent Without Official Leave during the notice period.

11. Evidence supporting the action taken.

12. ( ) Appellant has not submitted any answer to the charges in the appeal petition.

    (✓) The agency hereby denies any and all allegations made by the appellant in the appeal petition.

As an enclosure to the Notice of Decision, appellant was given an explanation of appeal rights to the MSPB, which included the MSPB Appeal Form, MSPB 20(7/79), and a copy of the Board Regulations, as published in the Federal Register, June 29, 1979. Copies of these documents are not included with this submission.

The designated agency representative is:

Thomas C. Halloran, Esq.
FAA Regional Counsel, AEA-7
Federal Building—John F. Kennedy International Airport
Jamaica, New York 11430

Telephone No. FTS 665-2814

Logistical questions should be directed to the undersigned or staff member at FTS 665-8640.

Sincerely,

ROBERT H. HUNTER
Chief, Labor Relations Branch

Enclosures

A102

DEPARTMENT OF TRANSPORTATION
Federal Aviation Administration
Eastern Region
Federal Building
John F. Kennedy International Airport
Jamaica, New York 11430

AUG 6 1981

Mr. William A. Amodeo
19 Osaga Court
Coram, New York 11727

Dear Mr. Amodeo:

This is notice that I intend to remove you from your position of Air Traffic Control Specialist, GS-2152-12-1, $26,952.00 per annum at the New York Air Route Traffic Control Center, Ronkonkoma, New York. The reasons for the proposed action are:

> *Reason 1:* Violation of 5 U.S.C. 7311, which states in pertinent part, "An individual may not accept or hold a position in the Government of the

United States . . . if he . . . participates in a strike against the Government of the United States . . ."; and 18 U.S.C. 1918, which makes participation in a strike against the Government of the United States a crime for which a sentence of imprisonment can be imposed.

Specification: Beginning at approximately 7 A.M. EDT, on August 3, 1981, a nationwide strike by air traffic controllers occurred. Beginning at 7 AM EDT, on August 3, 1981, when you failed to report for duty, until the present, you participated in a strike against the United States Government.

Reason 2: Unauthorized Absence

Specification: Beginning first at the 0700 to 1500 shift on August 3, 1981, you failed to report for your scheduled tour of duty. On August 3, 1981, you were sent a telegram that an illegal strike was in progress, and that you must return to duty for your regularly scheduled shift. You failed to return to duty, and instead remained absent without authorization.

The material relied upon to support this proposed action is available for review at the Personnel Office, New York ARTCC, Ronkonkoma, New York. If you wish to review this material, please contact Mr. Thomas Wilson, New York ARTCC, Ronkonkoma, New York, telephone number (516) 737-3405.

The foregoing action constitutes a strike against the government prohibited by 18 U.S.C. 1918, and 5 U.S.C. 7311. This gives me reasonable cause to believe you have committed a crime for which a sentence of imprisonment can be imposed. Therefore, you may reply to this notice personally, in writing or both, and furnish affidavits and other documentary evidence in support of your answer to me, within 7 calendar days after you receive this letter. In making a reply you have the right to be represented by an attorney or other representative. As soon as possible after your reply is received, or after the expiration of the 7-day limit if you do not reply, I will issue a written decision on the proposed removal.

Original signed by:

LOUIS C. POL
Chief, New York ARTCC

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION

N.Y.A.R.T.C.C. Chapter
PATCO Local 201
P.O. Box 398
Bohemia, N.Y. 11716

Affiliated with M.E.B.A. (AFL-CIO)

AUG 10 1981

NEW YORK ARTCC
Ronkonkoma, N.Y. 11779

Re: William A. Amodeo

Dear Mr. Pol:

This is to request an extension of time in which to file a written answer to the notice of proposed action against me for the reasons stated below.

First, there is no basis to the charge that I have committed a crime for which a sentence of imprisonment may be imposed. Therefore, the crime exception to the rule set forth in 5 U.S.C. S7513, which requires that I be given a thirty (30) day advance notice of this proposed action, is inapplicable.

I also understand that even if the crime exception to the 30-day rule is invoked, the controlling criterion is that I am entitled to a "reasonable time," (which may not be *less* than seven days) in which to file my answer. 5 U.S.C. S7513(b)(2). I do not feel that, under the circumstances that apply, seven days is a reasonable time for filing a response

I request that copies of all the materials relied on by the FAA to support its proposed action be sent to me. By separate letter to the Freedom of Information Office of the FAA, I am also requesting disclosure of all notices of proposed actions issued since January 1, 1978, and between January 1, 1969, and January 1, 1971. As I am entitled to review all of the materials relied on by the FAA to support its proposed action, se 5 C.F.R. S7552.404, I request that I be given at least 20 days from the receipt of these materials to answer personally the charges.

I hereby designate Glenn R. Truesdell as my representative in this proposed action. Please send copies of all communications in this action to Mr. Truesdell at: P.O. Box 398, Bohemia, N.Y. 11716.

Sincerely,

WILLIAM A. AMODEO

F21

PROFESSIONAL AIR TRAFFIC CONTROLLERS
ORGANIZATION

N.Y.A.R.T.C.C. Chapter
PATCO Local 201
P.O. Box 398
Bohemia, N.Y. 11716

Affiliated with M.E.B.A. (AFL-CIO)

AUG 10 1981

Freedom of Information Office (ATA-10)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591

To Whom It May Concern:

This is to request that the Federal Aviation Administration make disclosure and provide copies of certain materials available under the Freedom of Information Act, 5 U.S.C. Section 552, and the relevant regulations of the agency.

Specifically, I request disclosure to me of records held in any form that (a) document adverse personnel action proposals and final decisions by the FAA since January 1, 1978, and from January 1, 1969, through January 1, 1971; (b) indicate how FAA determines whether there is "reasonable cause to believe that a crime for which a sentence of imprisonment can be imposed" has been committed, within the meaning of the words "participates" and "strike," as found in 5 U.S.C. S7311(3), and the authority for such interpretations.

The FAA has initiated disciplinary proceedings against me, and access to the materials requested above is necessary for me to prepare an adequate defense. If any portion of this request is denied, I request a detailed statement of the reasons for the withholding and an index or similar statement of the nature of the documents withheld.

Pursuant to the Act, I request waiver of all charges, but, if waiver is denied, I promise to pay reasonable charges incurred for an appropriate search and copying of these documents upon presentation of an invoice along with the finished documents.

If search and copying fee will exceed $25.00, please notify my representative Glenn R. Truesdell, or myself, at (516) 289-9852. You may notify us whether this request will be granted at the address below. I would appreciate hearing from you as soon as possible so that I may begin to prepare my defense. Thank you for your assistance.

Sincerely,

WILLIAM A. AMODEO
P.O. Box 398
Bohemia, N.Y. 11716

CC: NYARTCC

DEPARTMENT OF TRANSPORTATION
Federal Aviation Administration

New York Air Route Traffic Control Center
Long Island MacArthur Airport
Ronkonkoma, New York 11779

Mr. William A. Amodeo
19 Osaga Ct.
Coram, NY 11727

F23

Dear Mr. Amodeo:

This is in response to your letter dated August 10, 1981, requesting an extension of time to file a written answer to the proposed removal action.

Your request for an extension of time to submit a written reply is denied. Since the material you are requesting under FOIA was not relied upon for the proposed action; search, sanitizing and copy time will not serve as the basis for any time extension.

Your written and/or oral response is due prior to the expiration of the seven day notice period.

Original signed by:

LOUIS C. POL
Chief, New York ARTCC

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION

N.Y.A.R.T.C.C. Chapter
PATCO Local 201
P.O. Box 398
Bohemia, N.Y. 11716

Affiliated with M.E.B.A. (AFL-CIO)

AUG 13 1981

New York ARTCC
Ronkonkoma, N.Y. 11779

Re: William A. Amodeo

Dear Mr. Pol:

This is in response to the proposed removal action against me dated August 6, 1981

Because I have been informed in a pre-prepared notice that FAA believes I committed a crime and because of ambiguities in the notice and the statutes that apply, I cannot deny or affirm the charges at this time.

In order for me to protect my rights and answer fully, I need to know how it was determined that I was participating in a strike (which is a crime). There is, as far as I know, no definition of the term "strike" or "participating" applicable to employees in the federal sector. I must know this information and how strike status differs from AWOL or sick leave status before I am able to answer the charges.

I have requested from the FAA's Freedom of Information Office copies of all notices of adverse personnel actions since January 1, 1978 and between January 1, 1969 and January 1, 1971, as well as all final FAA decisions in the adverse action cases initiated by those notices, in addition to other information relating to interpretation of terms used in the notice. Because I have not yet received this information, I do not feel that I have been allowed to prepare my defense adequately. I believe that any decision in my case should wait until I have been given a reasonable opportunity to review this information.

Sincerely,

WILLIAM AMODEO

DEPARTMENT OF TRANSPORTATION
Federal Aviation Administration
Eastern Region
Federal Building
John F. Kennedy International Airport
Jamaica, New York 11430

August 19, 1981

Mr. William A. Amodeo
19 Osaga Ct.
Coram, New York 11727

Dear Mr. Amodeo:

My letter of August 6, 1981, informed you of a proposal to remove you from your position of Air Traffic Control Specialist, GS-2152-12/1, $26,951 per annum at the New York ARTCC, Ronkonkoma, N.Y. I have given full consideration to all the facts and circumstances in this case including:

(x) Your written reply of August 13, 1981.

I have found that all reasons and specifications cited in the proposal letter are fully supported by the evidence and warrant your removal to promote the efficiency of the service. It is my decision, therefore, that you be removed effective August 22, 1981.

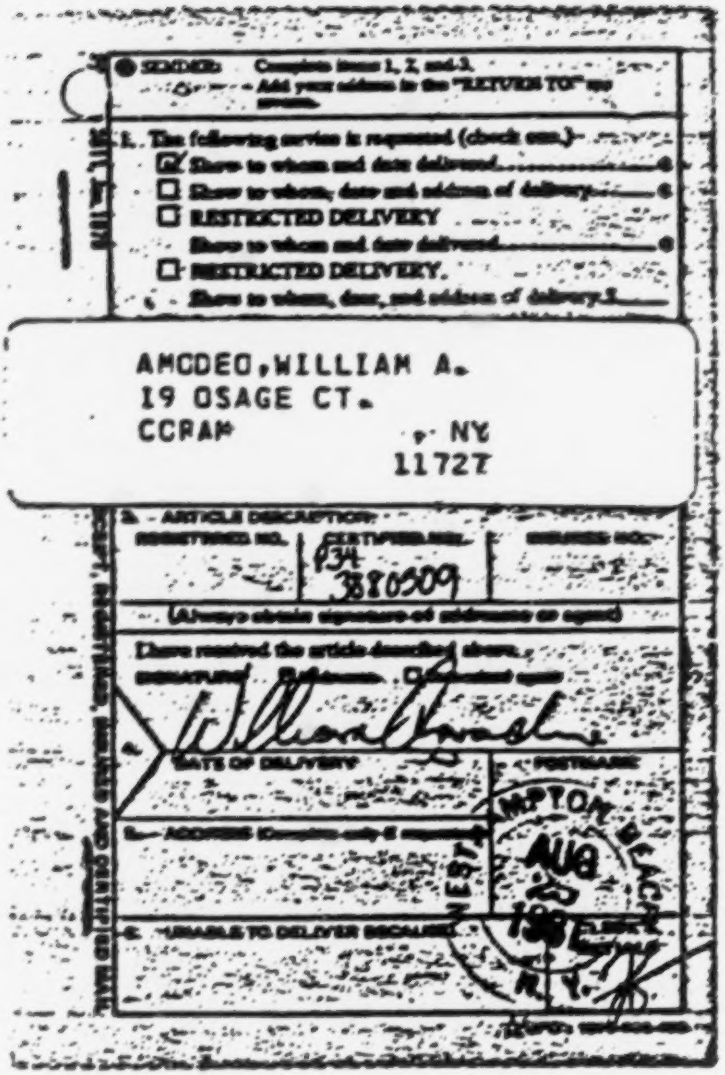
The enclosures with this letter explain your rights to appeal or grieve this action, and include an Appeal/Grievance Procedure Addendum, the MSPB Appeal Form and a copy of MSPB Regulations. In this connection you should know that the FAA has filed an Unfair Labor Practice (ULP) charge against PATCO for its role in the strike and is seeking to have the Union decertified. The case is now being processed by the Federal Labor Relations Authority and a determination that PATCO committed a ULP could impact on the processing of grievances under the PATCO/FAA agreement. If the Union is decertified and the agreement terminated, this avenue of appeal may not be available to you.

Sincerely,

LOUIS C. POL
Chief, New York Center

Enclosures

F27



RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

● SENDER: Complete items 1, 2, and 3.
Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one.)
☑ Show to whom and date delivered
☐ Show to whom, date and address of delivery
☐ RESTRICTED DELIVERY
Show to whom and date delivered
☐ RESTRICTED DELIVERY.
Show to whom, date, and address of delivery

AMCDEO,WILLIAM A.
19 OSAGE CT.
CCRAM NY
11727

2. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	934 3880509	

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

William

4. DATE OF DELIVERY

POSTMARK

WESTHAMPTON BEACH N.Y. AUG 25 198

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE:

CLERK'S INITIALS

BEST AVAILABLE COPY

BEST AVAILABLE COPY

F28

FAA Form 2730-68 (6-78)

138

TIME AND ATTENDANCE REPORT

SOCIAL SECURITY NO.	C/D	NAME	OT CD	N/E	FPS	COST CENTER	LEAVE BALANCES CAT	PP	ANNUAL	SICK	COMP	AG	REG	BLK	PAY PERIOD NO.	END DATE	T&A DIST
050-40-3304	31	AMOLEO, WILLIAM A.	1	N	GS	2100	6	15	82-	4	0-00	1	EA	06	17	81-08-08	000

MEAL TIME START STOP ◆ ◆ ◆ ◆ *Leave blank if no meal time is included in the assigned shift.*

DAY	ASSIGNED SHIFT START	ASSIGNED SHIFT STOP	TIME WORKED OUTSIDE SHIFT COND. OPTIONS	START	STOP	TIME NOT WORKED TYPE	START	STOP	INIT.	TRAVEL TYPE	START	STOP	HAZARD/ENVIRONMENTAL TYPE	RATE %	START	STOP	DAY
S 01	1500	2300	1 2 3 4 5 6 7														01
M 02			1 2 3 4 5 6 7														02
T 03			1 2 3 4 5 6 7														03
W 04			1 2 3 4 5 6 7														04
T 05	1300	2100	1 2 3 4 5 6 7														05
F 06	RDO		1 2 3 4 5 6 7														06
S 07	RDO		1 2 3 4 5 6 7														07
S 08	0800	1600	1 2 3 4 5 6 7														08
M 09	0700	1500	1 2 3 4 5 6 7			14	0700	1500									09
T 10			1 2 3 4 5 6 7			14	0700	1500									10
W 11			1 2 3 4 5 6 7			14	0700	1500									11
T 12			1 2 3 4 5 6 7			14	0700	1500									12
F 13	RDO		1 2 3 4 5 6 7														13
S 14	RDO		1 2 3 4 5 6 7														14
			1 2 3 4 5 6 7														
			1 2 3 4 5 6 7														
			1 2 3 4 5 6 7														
			1 2 3 4 5 6 7														
			1 2 3 4 5 6 7														
			1 2 3 4 5 6 7														
			1 2 3 4 5 6 7														

WAE - When Actually Employed With No Assigned Shift
IRR - Irregular Workweek with No Assigned Shift
RDO - Regular Day Off
NAS - No Assigned Shift Begins
HOL - [illegible]
NDP - [illegible]

CONDITION OPTIONS

Circle appropriate condition digit for each statement that is true

7 [illegible]
6 [illegible]
5 [illegible]
4 [illegible]
3 [illegible]
2 Time is callback
1 Comp Time is requested

If none of the above conditions exist, do not circle

NOT WORKED TYPE CODES

01 Annual Lv
02 Sick Lv
03 Holiday Lv
04 Comp Lv
05–20 [illegible]

*SICK LEAVE CERTIFICATION

[illegible]

TRAVEL TYPE CODE

30 [illegible]
31 [illegible]
38 [illegible]
41 [illegible]
42 [illegible]
50 [illegible]

ENV TYPE CODE

1 Actual Exposure
2 All Hours in Pay Status

ADVANCE SICK LV

Date App ______ Begin Date ______ Hours ______

Overtime, Holiday, Comp Time App

☐ By Supv
☐ By DOT Form [illegible]

CERTIFIED CORRECT

T&A Clerk Init ______

T&A Clerk Signature

Employee [illegible] ______

Supervisor's Signature ______

REMARKS

DEPARTMENT OF TRANSPORTATION
Federal Aviation Administration
Eastern Region
Federal Building
John F. Kennedy International Airport
Jamaica, New York 11430

August 12, 1981

Mr. Robert A. Biancammo
64 Mainsail Drive
Patchogue, NY 11772

Dear Mr. Biancammo:

This is notice that I intend to remove you from your position of Air Traffic Control Specialist, GS-2152-14-4, $41,657.00 per annum at the New York Air Route Traffic Control Center, Ronkonkoma, New York. The reasons for the proposed action are:

> *Reason 1:* Violation of 5 U.S.C. 7311, which states in pertinent part, "An individual may not accept or hold a position in the Government of the United States . . . if he . . . participates in a strike against the Government of the United States . . ."; and 18 U.S.C. 1918, which makes participation in a strike against the Government of the United States a crime for which a sentence of imprisonment can be imposed.
>
> *Specification:* Beginning at approximately 7 A.M. EDT, on August 3, 1981, a nationwide strike by air traffic controllers occurred. Beginning at 3pm, EDT, on August 5, 1981, when you failed to

report for duty, until the present, you participated in a strike against the United States Government.

Reason 2: Unauthorized Absence

Specification: Beginning first at the 1500 to 2300 shift on August 5, 1981, you failed to report for your scheduled tour of duty. On August 3, 1981, you were sent a telegram that an illegal strike was in progress, and that you must return to duty for your regularly scheduled shift. You failed to return to duty, and instead remained absent without authorization.

The material relied upon to support this proposed action is available for review at the Personnel Office, New York ARTCC, Ronkonkoma, New York. If you wish to review this material, please contact Mr. Thomas Wilson, New York ARTCC, Ronkonkoma, New York, telephone number (516) 737-3405.

The foregoing action constitutes a strike against the government prohibited by 18 U.S.C. 1918, and 5 U.S.C. 7311. This gives me reasonable cause to believe you have committed a crime for which a sentence of imprisonment can be imposed. Therefore, you may reply to this notice personally, in writing or both, and furnish affidavits and other documentary evidence in support of your answer to me, within 7 calendar days after you receive this letter. In making a reply you have the right to be represented by an attorney or other representative. As soon as possible after your reply is received, or after the expiration of the 7-day limit if you do not reply, I will issue a written decision on the proposed removal.

ORIGINAL SIGNED BY

LOUIS C. POL
Chief, New York ARTCC

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION

N.Y.A.R.T.C.C. Chapter
PATCO Local 201
P.O.Box 398
Bohemia, N.Y. 11716

Affiliated with M.E.B.A. (AFL-CIO)

AUG 14 1981

New York ARTCC
Ronkonkoma, N.Y. 11779

Re: Robert Biancamano

Dear Mr. Pol:

This is in response to the proposed removal action against me dated August 12, 1981.

Because I have been informed in a pre-prepared notice that FAA believes I committed a crime and because of ambiguities in the notice and the statutes that apply, I cannot deny or affirm the charges at this time.

In order for me to protect my rights and answer fully, I need to know how it was determined that I was participating in a strike (which is a crime). There is, as far as I know, no definition of the term "strike" or "participating" applicable to employees in the federal sector. I must know this information and how strike status differs from AWOL or sick leave status before I am able to answer the charges.

I have requested from the FAA's Freedom of Information Office copies of all notices of adverse personnel actions since January 1, 1978 and between January 1, 1969 and January 1, 1971, as well as all final FAA decisions in the adverse action cases initated by those notices, in addition to other information relating to interpretation of terms used in the notice. Because I have not yet received this information, I do not feel that I have been allowed to prepare my defense adequately. I believe that any decision in my case should wait until I have been given a reasonable opportunity to review this information.

Sincerely,

ROBERT BIANCAMANO

DEPARTMENT OF TRANSPORTATION
Federal Aviation Administration
Eastern Region
Federal Building
John F. Kennedy International Airport
Jamaica, New York 11430

August 23, 1981

Mr. Robert Biscamano
64 Mainsail Drive
Patchogue, NY 11775

Dear Mr. Biscamano

My letter of August 12, 1981, informed you of a proposal to remove you from your position of Air Traffic Control Specialist, GS-2152-14/4, $41,657.00 per annum at the New York ARTCC, Ronkonkoma, New York. I have given full consideration to all the facts and circumstances in this case including:

(x) Your written reply of 3/14/81.

I have found that all reasons and specifications cited in the proposal letter are fully supported by the evidence and warrant your removal to promote the efficiency of the service. It is my decision, therefore, that you be removed effective August 28, 1981.

The enclosures with this letter explain your rights to appeal or grieve this action, and include an Appeal/Grievance Procedure Addendum, the MSPB Appeal Form and a copy of MSPB Regulations. In this connection you should know that the FAA has filed an Unfair Labor Practice (ULP) charge against PATCO for its role in the strike and is seeking to have the Union decertified. The case is now being processed by the Federal Labor Relations Authority and a determination that PATCO committed a ULP could impact on the processing of grievances under the PATCO/FAA agreement. If the Union is decertified and the agreement terminated, this avenue of appeal may not be available to you.

Sincerely,

LOUIS C. POL
Chief, New York Center

Enclosures

Appendix G—*Trick v. F.A.A.* ____ MSPB ____ (No. DC 0752811 F1144, 12/17/81) Order Denying National Consolidation of MSPB Cases.

UNITED STATES OF AMERICA,

MERIT SYSTEMS PROTECTION BOARD

DAVID A. TRICK

v.

FEDERAL AVIATION ADMINISTRATION

MSPB Docket No. DC0752811F1144

ORDER ON MOTION FOR CONSOLIDATION

Movant, David A. Trick, is among 10,886 nonprobationary air traffic controllers who have appealed from the action of the Federal Aviation Administration in removing them from their employment for allegedly participating in an unlawful strike and for absence without leave. On October 30, 1981, Mr. Trick filed a motion with the Board to consolidate "the entire class" of air traffic controllers' removal appeals for the purposes of (1) determining common issues of law and fact; (2) overseeing such discovery as would most efficiently be held at the national level; (3) and certifying to the Board "questions the resolution of which will facilitate the fair and efficient disposition of such appeals."

By order dated November 10, 1981, the Board provided notice of the motion to all interested parties by service on known parties or their representatives, as well as publication of its order in the *Federal Register* and newspapers throughout the country. Respondents were requested to present their views of the matters raised by movant. In addition, the Board requested that respondents specifically address the following matters:

> (1) identification of all common issues of fact and law which may be national in scope, and which therefore may appropriately be the subject of discovery and determination on a nationally consolidated basis;
>
> (2) the nature and extent of anticipated discovery requests in any such consolidated proceeding;
>
> (3) the identification, by name and title, of persons whose testimony would probably be requested with respect to matters to be determined in any such consolidated proceeding;
>
> (4) the extent to which appellants can agree upon designation of common or lead counsel for purposes of (a) serving and receiving service of pleadings and documents, and/or (b) representation with respect to any such consolidated proceeding;
>
> (5) identification by name of all interested appellants raising potentially dispositive individual defenses which are unrelated to the alleged strike; and

(6) identification by name of any interested party who believes that his, her or its rights would be prejudiced or interests adversely affected by any such consolidation, specifying the nature, extent, and reasons for such prejudice.

The Board has received approximately 500 responses to the motion and order on behalf of approximately 10,000 appellants. The response by movant Trick typifies the responses of those supporting the motion to consolidate appeals at the national level. He submits that "it would be appropriate and more efficient for the Board to delegate to a presiding official the responsibility of initially designating the common issues after receiving written submissions from interested parties." Movant declined to disclose his views on such issues. The responses by movant and other supporters of the motion to the Board's request for views on anticipated national discovery and national witnesses were similarly unilluminating; scant information on anticipated common discovery requests or potential common witnesses has been provided. A few proponents of national consolidation did attempt in very general terms to identify perceived national issues which consisted largely of alleged procedural errors by the agency in effecting the removal actions.

Opponents of the motion contend that the present stage of appeals is too embryonic and consequently, common issues are not yet sufficiently developed to warrant consolidation. They allege that administering a consolidated appeal of such magnitude would result in confusion and protracted adjudication and jeopardize the rights of appellants to fair representation. They also allege that the facts and legal theories on which many appellants intend to rely in contesting the agency's actions are too diverse for national consolidation. Some respondents contend that the expense and inconvenience to the parties in participating in a nationally consolidated proceeding are inapposite to the purposes of consolidation—convenience and economy in administration. Opponents, and indeed many supporters of the motion, voiced strong opposition to the appointment of common or lead counsel.[1] Several appellants allege potentially dispositive defenses to the charges made by the agency which are based on circumstances unique to each of them. Thus, they contend, the determinations of common issues would not likely concern them. Many of the respondents allege facts which, if true, present potential conflict with appellants represented by the Professional Air Traffic Controllers (PATCO), the controllers' union.

The Board has the authority to consolidate appeals if to do so would "result in the appelas being processed more expeditiously, and would not adversely affect any party." 5 U.S.C. § 7701 (f).[2] If either or both conditions would not be met, the motion for consolidation must be denied. In the Board's considered judgment, neither test would be met in this instance.

The responses to the motion and the Board's Order make it abundantly clear that there are not, at this time, discernible common issues of fact or law, the resolution of which would facilitate the adjudication of individual appeals. No discovery has been completed by any parties and, indeed, the agency has not yet filed its answer and supporting documents on many appeals. The movant himself is either unable or unwilling to amplify on the general description of common issues contained in his motion which he believes compel national consolidation. Movant requests the Board to consolidate for the purpose of identifying common issues. However, identification of common issues is ordinarily a prerequisite to consolidation. *Kershaw v. Sterling Drug, Inc.*, 415 F.2d 1009, 1012 (5th Cir. 1969).

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[1] The Board notes some confusion and misunderstanding by respondents to the Board's requests for recommendations of common or lead counsel. Opposition to the concept addressed only the issue of common counsel to represent the appellants in a proceeding to decide common questions of fact or law. The Board also sought the parties' views on potential designation of lead counsel for the ministerial function of serving and receiving service of pleadings and documents and to otherwise facilitate the administration of a consolidated proceeding.

[2] *Cf.*: Fed. R. Civ. P. 42(a) which allows the courts greater latitude to order consolidation when in their judgment they find that consolidation may tend to avoid unnecessary costs or delay.

Even assuming the existence of common issues, such common issues alone are not enough in the absence of other factors which would promote convenience and economy in administration. *Prudential Insurance Co. of America v. Marine National Exchange Bank*, 55 FRD 436 (E.D. Wis. 1972); *Schact v. Javits*, 53 FRD 321 (S.D.N.Y. 1971); *Journapk Corp. v. Blair*, 27 FRD 509 (S.D.N.Y. 1961).

The factors present here belie such convenience and economy. The appeals are presently at varying stages within the Board's eleven regional offices. Many of the parties will undoubtedly be unable adquately to present their views before the presiding official until after receipt of the complete appeal file compiled by the agency. In other cases, the appellants are now prepared to proceed to hearing.[3]

---

[3] *Cf.: Schact, supra; Transeastern Shipping Corp. v. India Supply Mission*, 53 FRD 204 (D.C.N.Y. 1971). In both cases, the different stages of development of the cases sought to be consolidated were factors in denying consolidation. The courts expressed the opinion that consolidation would prejudice the parties who were further along in the litigations.

Furthermore, although the appellants' terminations were based on identical charges, the facts and theories upon which they rely in contesting the agency's actions are diverse and, in many instances, unique to their particular circumstances. The Board's review of the various approaches to the appeals indicates that no appreciable savings of time would be gained by consolidating the appeals for limited purposes at the national level. For example, no resolution of appeals could result from a nationally consolidated proceeding addressing questions regarding alleged procedural errors by the agency which were cited by some appellants as examples of common issues. The statutory harmful error test[4] requires the Board to give individual consideration to each appellant's claim of harm. Similarly, the issue as to whether the appellants willfully participated in an unlawful strike may not be determined except on the basis of the intent manifested by the individual appellants. Thus, appellants who successfully demonstrate that their absence from work at the time of the alleged strike resulted from duress, or a good faith belief that they were on approved leave, might be found not to have participated in the alleged unlawful strike.[5]

The Board also recognizes that a consolidated proceeding may cause considerable inconvenience and expense to parties living several hundreds of miles from the Board's headquarters in Washington, D.C. Similarly, the administrative burdens on the Board to insure the rights of all parties would be formidable.[6] Management of a consolidation of almost 11,000 appeals would be additionally complicated by virtue of the many parties appearing *pro se* and the apparent animosity which exists between parties who have identified themselves with PATCO and those who have disclaimed any sharing of interests or objectives with PATCO.[7]

---

[4] 5 U.S.C. §7701(c)(2)(A); *see Parker v. Defense Logistics Agency,* 1 MSPB 489 (1980).

[5] *Cf.: Windham v. American Brands Inc.,* 569 F.2d 59, 66 (4th Cir. 1977). The court upheld denial of a class action noting that the issues of injury and damage in an anti-trust suit are always strictly individualized.

The movant bears the burden of persuading the Board that common questions of fact and law exist, that consolidation would expedite resolution of those common questions, and that it is in the best interests of the parties. *Prudential Insurance, supra,* 55 FRD 436, 437; *Schact, supra,* 53 FRD 321, 324-325. In the instant case, neither the movant nor those supporting the motion have provided the Board with information adequate to conclude that those criteria have been satisfied. By contrast, the potential for delay, administrative inconvenience and confusion militate strongly against a national consolidation at this stage of the proceedings.

Although the Board cannot justify national consolidation on the basis of the data before us at this time, the Board recognizes consolidation may be warranted at the regional offices where there is substantial commonality of counsel, work site, witnesses, and/or legal defenses. Presiding officials in the regional offices are in a posture to address individual claims as well as common issues of fact and law. We can, of course, consider for interlocutory appeal or other precedential decision, any appropriate issues which may arise in the course of the regional proceedings. Nor do we hereby preclude consideration of subsequent motions for national consolidation based on circumstances arising hereafter in these proceedings.

---

[6] *Windham, supra,* at 69. The court found no justification for certification of a class where the effect would be to bring in thousands of possible claimants all of whom may assert individualized claims requiring a "tremendously time-consuming and costly" procedure. Although that case concerns the appropriateness of a class action and not consolidation, it does point out the inherent difficulties of managing litigation of large numbers of persons having individualized claims.

[7] *Cf.: Dupont v. Southern Pacific Co.,* 366 F.2d 193 (5th Cir. 1966). The district court was found to have abused its discretion in consolidating cases where plaintiffs alleged incompatible claims and lead counsel could not properly and adequately represent all plaintiffs.

The Board also recognizes that multitudinous motions for discovery to be served on persons at the national level may require careful consideration by the Board's officials to avoid burdensome demands on those persons from whom discovery is sought. In this regard, it is anticipated that the Board's regional offices will coordinate their activities and endeavor to proceed at approximately the same pace. Accordingly, the regional offices will, in the near future, issue orders setting time limits in which to file motions for discovery. In accordance with the Board's procedures,[8] motions for depositions, subpoenas, or interrogatories will be referred to one of the Board's administrative law judges who will be able to coordinate scheduling and ensure against undue burdens.[9]

For the foregoing reasons, the Motion for Consolidation is hereby DENIED.

FOR THE BOARD:

December 17, 1981
(Date)
Washington, D. C.

ERSA H. POSTON
Vice Chair
RONALD P. WERTHEIM
Member

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[8] 5 C.F.R. §§ 1201.71-1201.75.

[9] It is not expected that motions for discovery at the national level will delay the expeditious adjudication of appeals by the appellants who do not wish to engage in discovery at the national level, nor wish to benefit from the fruits of such discovery.

Appendix H—*Amodeo v. F.A.A.* ____ MSPB ____ (No. NY075281F-0430-JL Sample Solerwitz Motion for Discovery.

MERIT SYSTEMS PROTECTION BOARD

NEW YORK FIELD OFFICE

◆

In Re Appeal of

AMODEO, WILLIAM A.

NY075281F-0430-JL

◆

MOTION FOR DISCLOSURE AND PRODUCTION OF DOCUMENTS

The above-named Appellant, by his Attorney hereto undersigned, pursuant to 5 CFR 1201.71 *et seq.* and 5 USC 1205 (2)(A), hereby moves that the Agency be Ordered to supply said appellant with the following materials, information, and documents, all of which are relevant hereto, and are in the exclusive possession and control of the Agency (hereinafter referred to as FAA).

1. Any evaluations, performance ratings, and/or letters of commendation or the like, including all papers and documents in Appellants personnal file, received by Appellant during his tenure with the FAA.

2. Complete Records of all disciplinary actions and/or proceedings undertaken by FAA from and including the year 1969 for conduct allegedly amounting to or con-

cerned with alleged violation of 5 USC 7311 and/or 18 USC 1918, or any other unauthorized job action, including the following information in each case.

a. The penalty proposed, the penalty sustained, in any, and the final level on which appeal was sought or had by either party.

b. The current position, if any held by the subject of the disciplinary action.

c. Copies of any final determination in each said proceeding, whether before any administrative or judicial forum.

Appellant consents that portions of such material identifying the person so subject to disciplinary action in such material be held in confidence by Appellant's counsel in order to comply with the Privacy Act.

3. A list of all FAA's proposed witnesses, together with their criminal records, if any, and administrative disciplinary records, if any, and copies of any and all prior statements made by them in this matter, whether sworn to or not.

a. For each such witness, list all criminal or administrative actions and the disposition of each one, undertaken in whole or in part because of, or utilizing, their testimony.

b. Appellant also requests subpoenas issue for all persons who determined that he engaged in prohibited conduct, and that proposed and/or decided that he should be removed, all persons described in

Item 2 *supra* who have been promoted, as well as any person who determined that all persons allegedly engaging in a strike should be removed, and the authors of all documents described in Item 4 and 6.

4. All documents upon which FAA relies to show that Appellant;

a. Did not report for work as required.

b. Did not have a lawful excuse therefore.

c. Did so as part of a concerted refusal to work.

5. A complete list of all health records of employees working at the installation where Appellant is or was employed, including all applications for disability retirements of employees of that installation. This request is limited in time to the past five years.

6. Any table of permissible penalties compiled by or used by the FAA whether or not relied upon in this case, as well as any policy statements, internal directives, guidelines, regulations, or the like upon which FAA relied in deciding to remove Appellant, or which relate to conduct such as Appellant is alleged to have engaged in.

7. The Appellant reserves the right to seek subpoenas of any and all witnesses pursuant to 5 CFR 1201 81 until lists of witnesses has been exchanged on or before April 1, 1982.

STATEMENT OF NEED

Pursuant to the Order of Mitchell Kastner, Acting Regional Director, dated February 3, 1982, the following is a statement setting forth the necessity of the foregoing discovery.

1. Item 1 is needed in order to determine the Appellants work record. Since discipline can only be imposed for the efficiency of the service, the value of the employee is plainly relevant, and the MSPB is compelled to look into this matter in all disciplinary actions pursuant to *Douglas v. General Services Administration.*

2. The FAA is required to treat like offenses similarly. Appellant is entitled to review what penalties have been proposed for and imposed upon employees who are alleged to have committed the same offense. This factor is also a mandatory consideration under *Douglas v. General Services Administration.* The reasoning used to arrive at such decisions is also relevant, as is the retention or even promotion of employees who have engaged in conduct similar to that for which Appellant is threatened with discharge.

3. Item 3 is arguably premature in terms of the portion of the Order compelling exchange of witness lists by April 1, 1982. However the same Order refers to complying with 5 CFR 1201.71-1201.84, which includes the issuence of subpoenas. Lest Appellant be considered to have waived any rights pursuant to that Order, he is obliged to protect his rights by requesting this remedy at this time. See Item 7.

4. This Item describes the absolute minimal documentation that FAA will be expected to produce at any hearing herein. Appellant has the right to see the proof that FAA expects to adduce at such hearing, in order to see if the action proposed against him was reasonable in its basis, as required by *Douglas v. General Services Administration.*

5. Appellant contends in part that there was the functional equivalent of a lockout by FAA in that a safe a healthful work environment was not provided by FAA. This information will substantiate that claim. Moreover, the fact of a dangerous or even life-threatening work environment is a relevant element to be used in considering the reasonableness of any penalty inflicted for the alleged conduct herein.

6. FAA is required to comply with its own internal regulations and rules in inflicting discipline upon its employees, and, additionally, the procedures by which it does so must be reasonable and related to the individual employee. Appellant has the right to know what rules or policies exist or were applied in his case, and to require FAA to show that it acted in compliance with its own rules, as well as that its rules were themselves proper and lawful.

7. In the event that no waiver of Appellants right to require the issuance of subpoenas is found for failure to specify each person to be subpoenaed at this time, then Appellant will reserve its rights until witness lists are exchanged. If that right will be held to have been waived by

its non-exercise at this time, the Appellant demands subpoenas be issued to the persons described in Item 3.

Dated: Mineola, New York
February 1982

Respectfully Submitted,

JACK B. SOLERWITZ
(by) DAVID S. HELLER
170 Old Country Road
Mineola, New York 11501
(516) 742-4300

MERIT SYSTEMS PROTECTION BOARD

NEW YORK FIELD OFFICE

In Re Appeal of

AMODEO, WILLIAM A.

NY075281F-0430-JL

ORDER

Appellant having made and served a Motion for Discovery together with a statement of reasons therefore and due deliberation having been had thereon, it is hereby

ORDERED that the said Motion is hereby granted, and the said discovery material shall be provided to Appellant prior to April 1, 1982, or the Agency action from which the Appellant's Appeal has been taken shall be reversed pursuant to 5 CFR 1201.43(b)

____
Presiding Official

Appendix I—Procedural History of Motion Practice Concerning Discovery and Selected Documents From Combined Appendix to FCCA.

On or about 2/25/82, Solerwitz filed Motion for disclosure and production of documents for *each* appellant. It was done on an individual basis—Sample annexed.

3/2/82	FAA filed Interrogatories and Protective order we filed reply to intercept and opposition to protective order.
2/17/82	FAA Motion for Reconsideration and Request for Hearings we opposed but joined in request for hearing.
2/18/82	FAA Motion for enlargement of time (Captioned Motion for Reconsideration) We cross moved for subpoenas for production of Witnesses.
2/19/82	FAA Motion to take official Notice of Strike. We opposed on 3/4/82.

The above three motions were responded to jointly in 1982.

3/17/82	(See Amodeo Appendix Vol II. MSPB denied FAA Motions).
3/10/82	FAA moved second time (1st time on 2/17/82) for Reconsideration of February 3, 1982 order. We responded 3/23/82.
3/26/82	FAA raised additional objection to Appellants discovery requests.
4/3/82	In response we made a Renewed Motion to compel response to Appellants Motion for Production and discovery.

3/31/82	FAA raised additional objection to 2/25 discovery requests.
4/7/82	We made another renewed motion to compel.

To my knowledge no written order was ever received on any of these motions. All are in Vol II of Appendix.

In the meantime John J. McCarthy Chief Administrative Law Judge in Washington, D.C. issued a discovery order noted ACJ-1 on 4/17/86. This disposed of our requests to depose President Reagan, etc. and defined a discovery plan. A previous motion order had requested submissions for appointments of "lead counsel" to conduct "national discovery". We were not appointed lead counsel—Leighton was one of the ones chosen.
Also our discovery requests were specific and not really national because the approach was to have appellants individual merits presented.

We moved for Reconsideration of ALJ-1 on 4/21/82 and our request to be denied because lead counsel was thereafter appointed and national discovery proceeded.

5/1/82	Pursuant to ALJ-1 we called to get Personnel Files (see letter in Appendix Vol. II).
5/7/82	FAA moved for Reconsideration of 2/3/82 order and ALJ-1.
5/14/82	We responded with a motion for sanctions based on FAA's refusal to comply with orders (Appendix Vol. II). FAA Motion was denied.
5/26/86	We renewed motion for sanctions for FAA failure to comply with MSPB orders.
5/25/82	James Cardinal, Regional Director, modifies 2/3/82 Order for Pre-hearing conferences; no decision on our several motion's for sanctions; new order makes it appellants who's attorneys

have responsibility to type and submit pre-hearing orders.

5/28/82 We file motion for reconsideration of Cardinals order. No response.

Meanwhile ALJ-1 reduced our right to discovery and instead of FAA providing the Personnel Files we had to send someone from our office to the regional headquarters and spend a couple of weeks copying the files ourselves.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

Appeal Nos.: 83-1162, 83-1163, 83-1164, 83-1165, 83-1166, 83-1167, 83-1168, 83-1169, 83-1170, 83-1171, 83-1172

◆

WILLIAM A. AMODEO,
Petitioner,
BRUCE R. BONACUM,
Petitioner,
RICHARD G. BURNS,
Petitioner,
WILLIAM F. CECIL,
Petitioner,
CHARLES E. DARCY,
Petitioner,
JAMES J. FINNEGAN,
Petitioner,
ROBERT BIANCAMANO,
Petitioner,
JOHN C. BRUNNER,
Petitioner,
KENNETH M. CARLSTROM,
Petitioner,
CHARLES J. CONTEGNI,
Petitioner,
WAYNE ENNIS,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

◆

COMBINED APPENDIX

Volume II (pp. 447-842)

SOLERWITZ, SOLERWITZ & LEEDS
Attorneys for Petitioners
170 Old Country Road
Mineola, New York 11501
(516) 742-4300

Response to Motions of February 17, 1982 and February 18, 1982 and February 19, 1982.

Before the

MERIT SYSTEMS PROTECTION BOARD

New York Field Office

◆

AIR TRAFFIC CONTROLLERS,

Appellants,

v.

DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION,

Respondent.

Docket No. NY075281F

◆

Federal Aviation Administration has made four more Motions in this matter, over a period of three days. Appellants on the attached schedule respond as follows.

1. Federal Aviation Administration's "Motion for an Enlargement of Time" dated February 18, 1982 is a miscaptioned Motion for Reconsideration. The relief sought is, in part, illegal. Federal Aviation Administration *must* produce agency employees; 5 CFR 1201.33. If not, Appellants cross move that all agency employees appearing on any witness list be subpoenaed pursuant to 5 CFR 1201.81 *et seq.* Appellants join in Federal Aviation Administration's Motion that witness lists be exchanged at the close of discovery, and therefore will decline to respond to Interrogatories 31-34 of Federal Aviation Administration's Interrogatories herein.

2. Federal Aviation Administration's "Motion to take Official Notice" dated February 19, 1982 utterly without legal basis, and must be denied. The matter which Federal Aviation Administration wishes the Board to take Notice of is solely an action by PATCO, a non-party to these proceedings. The Federal Rules of Evidence provide that facts can only be noticed which aid resolution of the specific case before the trier of fact, which is to say, are evidentiary in nature. See FREv. 401. However, the guilt or innocence of PATCO has no bearing on the acts of Appellants. Indeed, the presumed guilt of PATCO is referred to by Federal Aviation Administration precisely to cover its lack of evidence against individual Air Traffic Controllers, to whom it wishes, improperly, to impute PATCO's presumed guilt. Such evidence is not admissable. FREv. 402, 403.

Moreover, an adjudicative fact cannot be noticed until it is resolved, since it is still "subject to reasonable dispute" FREV. 211(b), and hence, cannot be verified. 5 CFR 1201.67. Federal Aviation Administration concedes that the determination which it seeks to have noticed is on review. (FAA Motion fn. 2, page 3). As such, it is still the subject of reasonable dispute, and not noticeable. Nor is media reportage the sort of material upon which one may rely in taking judicial notice, especially given the number of patently falsified stories (including Pulitzer Prize winning reports) which have lately appeared in newspapers due to unscrupulous reporters. Cf *U.S. v. Decker,* 600 F.2d 733, cert den. 444 U.S. 855 (1979). If the uncontradicted testimony of a the Salmon Fisheries Commission as to its regulations (whose alleged breach was the subject matter in *Decker*) is subject to dispute because "accurate determination" of its content is impossible, *a fortiori* accurate determination of the future result of a case *sub judice* before the Court of Appeals is impossible. This precludes judicial notice under either the Federal Rules of the Rules of the Merit Systems Protection Board.

3. Federal Aviation Administration's "Motion for Reconsideration" dated February 17, 1982 is also invalid. The Federal Aviation Administration does not have 900 or 1600 cases to handle; it has one (1) case, insofar as its evidence-in-chief is concerned, at least according to its own theory. See PP. 2, *supra.* There is no reason why it cannot disclose its case in Chief as ordered. Appellants, of course, consent to later disclosure of *rebuttal* exhibits, if any, so long as they are *bona fide* rebuttal exhibits, and not merely delayed elements of the Federal Aviation Administration's case in Chief.

4. Appellants join in Federal Aviation Administration's "Request for Hearings" of February 17, 1982 for a hearing of each case, reserving their rights to move for consolidation and/or for Class action status as appropriate pursuant to 5 CFR 1201.36 (a)(1) and/or 1201.27.

Dated: Mineola, New York
March , 1982

Respectfully Submitted,

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Attorneys for Appellants
170 Old Country Road
Mineola, New York 11501
(516) 742-4300

BY: DAVID S. HELLER

SOLERWITZ, SOLERWITZ & LEEDS
Attorneys and Counselors at Law
170 Old Country Road
Mineola, L.I., N.Y. 11501

(516) 742-4300

May 5, 1982

Thomas C. Halloran
FAA Regional Counsel
Federal Building
JFK Int'l Airport
Jamaica, New York 11430

Re: Air Traffic Controller Litigation

Dear Sir:

This morning a staff member again called your office with regard to our obtaining the Personnel Files of our clients pursuant to ALJ-1. We were advised by your secretary that we should call 212-995-8640 and they would have the files available for us.

We immediately made that call, and spoke to Scott Kallman, who advised that we would have to go through you.

We informed him that it was at your direction that we were calling him. He indicated no knowledge nor notice of this and further indicated that he could not have the files available until "maybe the end of next week."

We herewith put you on formal notice that the Order required that this material be provided as of April 23, 1982, some 18 days ago, and that this office on behalf of its clients reserves all of its rights and claims with regard to the failure to comply with this Order.

SOLERWITZ, SOLERWITZ, & LEEDS

(by) ______________________

KATHLEEN P. SOLERWITZ

KPS:smc

Motion for Sanctions Based on Respondent's Refusal to Comply With Orders of the MSPB.

Before the

MERIT SYSTEMS PROTECTION BOARD

New York Field Office

◆

AIR TRAFFIC CONTROLLERS,

Appellants,

vs.

DEPARTMENT TRANSPORTATION FEDERAL AVIATION ADMINISTRATION,

Respondents.

Docket No. NY075281F

◆

Appellants on the attached list, by their attorneys hereto undersigned, hereby move for sanctions against the Agency (FAA) for failure to comply with certain orders of the Board (hereinafter referred to simply as the MSPB), pursuant to 5 C.F.R. Section 1201.43(a).

1. The New York MSPB, by its Order dated February 3, 1982, as modified by the Order of the Administrative Law Judges of the MSPB, (hereinafter referred to as

ALJ-1), by Chief Adminstrative Law Judge, Hon. John J. McCarthy required the Eastern Region of the FAA to conference the various cases which make up this appeal.

2. Now, by motion dated May 7, 1982, the FAA has sought to have these Orders reconsidered. It is submitted that this Motion was made in bad faith, and is simply a continuation of the delaying tactics which have characterized the FAA's activities throughout this matter.

3. Respondent recites, on page 2 of its said Motion, that there has "not been an outpouring of requests" for such conferences. This statement lacks candor, to say the least. The experience of this firm in attempting to secure such conferences is illustrative of the reasons for the slow pace of these conferences.

4. On April 15, 1982, the undersigned Attorney called Diane Recio, Esquire, of the FAA's legal staff, in order to set up the Ordered conferences. In order to expedite matters, I volunteered to sort and consolidate the cases which are being handled by this office (a total of over 350 in this region alone) by common issues, a procedure which would substantially cut down on the claimed time of "one to three hours per case" set forth in the FAA's Motion. Ms. Recio, for the FAA, undertook to ascertain which cases, if any, FAA felt upon consideration, to be without merit, and to call me back upon having done so. Since the FAA has taken the position that only a small percentage of these cases are without merit from their viewpoint, this was a minor task.

5. At considerable effort, this office categorized each and every one of our cases. Ms. Recio, however, never recontacted us. We called the FAA several times, attempt-

ing to set up the conferences, and were met with refusals each time. Finally, on May 3, 1982, we sent a certified letter to the FAA demanding that they comply with the Orders of the MSPB. That letter, a copy of which is attached hereto as *Exhibit A,* never received a reply. Additionally, the law firm of Melnik, Morgan & Klein, who also represent numerous ATCs in this Region, have received similar treatment from the FAA, as shown by their letter of April 28, 1982, attached hereto as *Exhibit B.* It is more than simply regrettable that the FAA chose to conceal the existence of this sort of material from the MSPB when making their instant Motion.

6. This sort of conduct, which may only with charity be described as negligence, amounts to simple disregard for the binding effect of the MSPB's Orders. This conduct, and not any logistical difficulty, accounts for the FAA's refusal to cooperate with us in a procedure which was calculated, on our part, to minimize the difficulties of carrying out the mandate of the MSPB.

7. The MSPB may take notice of the fact that the FAA, encouraged perhaps by the unprecedented tolerence permitted it in employing delaying tactics, has become more and more brazen in its treatment of the MSPB. Indeed, it has not scupled to simply make false statements of fact before MSPB regions, as shown by the recent Order of the Dallas MSPB, by Presiding Official Latshaw, dated April 27, 1982, attached hereto as *Exhibit C.*

8. Paragraph 21 of Discovery Order ALJ-1 states that "The terms of this order may be modified or time limits extended only upon motion and a showing of good cause." No case reported to the knowledge of the undersigned permits a party, by engaging in the sort of obstruc-

tionist tactics described herein, to create an appearance of good cause for having a tribunal inscribe its imprimateur to the delay brought about by the party itself. It follows that FAA is in violation of ALJ-1.

9. The MSPB has had occasion, as a result of just such tactics as those described, to caution the FAA, that the result of the continuation of such tactics will be the imposition of sanctions. See ALJ-1(B), paragraph c, page 6, which states in pertinent part as follows:

> The FAA is expected to proceed as directed in ALJ-1 and in the Orders issued under the authority of ALJ-1 by the Regional Directors. Any further unilateral action to suspend compliance with specific Orders of the Board's regional offices which implement ALJ-1 will risk the imposition of appropriate sanctions.

10. In these circumstances, the conduct of the FAA merits the imposition of sanctions under 5 CFR 1201.43(4). P.O. Latshaw in her above-mentioned Order, specifically reminded FAA of the MSPB's powers to impose sanctions. The Administrative Law Judges of the MSPB have also reminded the FAA of this provision. Such warnings, it seems, have been of no effect. Sanctions must be imposed in order to vindicate the authority of the MSPB, and the rights of the Appellants.

11. It being the case that FAA has violated This region's Order of February 3, 1982, ALJ-1, and ALJ-1(B), the only question remaining is the nature and extent of the sanctions to be applied. In light of the cavalier fashion in which FAA has treated both this Region, and, indeed the MSPB itself, whose Administrative Law Judges authored

ALJ-1 and ALJ-1(B), and its misleading statements to the MSPB concerning the need for the relief requested in its Motion of May 2, 1982, severe sanctions are in order.

12. 5 CFR 1201.43 permits the Presiding Official to take steps up to and including the striking of pleadings for such conduct as the FAA has engaged in. 5 CFR 1201.43(4). In this instance, FAA, fully aware of the real logistical difficulties of the ATC appeals, and further aware of the dire economic straits in which the Appellants find themselves, is deliberately taking advantage of the situation, whose proportions may best be gauged by the fact that not one, but several of the Appellants have been driven to suicide. The FAA has offered several Appellants their jobs back, in cases where no colorable excuse ever existed for their removal, if the Appellants will forfeit their claims for back pay. It is an irresistable conclusion that the FAA's delaying tactics are aimed at making these shockingly callous offers more attractive to the affected Appellants.

13. The Appellants believe that they have complete defenses to the charges against them factually, as well as under the binding provisions of 5 CFR 1201.56(c)(3), and the elements set forth in *Douglas v. Veterans Administration* MSPB Docket No. AT075299006, (April 10, 1981) at page 33, as basic to the determination of reasonableness in disciplinary actions. Only the dilitory actions of the FAA have kept them from having the opportunity to establish these defenses. If, therefore, the MSPB draws the requisite inference against FAA as sanction for FAA's contemptuous refusal to comply with Orders herein, which is the least conceivable sanction, the result would necessarily be that FAA's pleadings must be stricken, and appropriate relief should flow therefrom. Respondent should further be ordered to pay the reasonable and necessary attorney's fees incurred by these Appellants in bringing this Motion.

WHEREFORE, Appellants pray that their Motion be granted in its entirety, and that the relief requested herein be granted.

Dated: Mineola, New York
May 14, 1982.

Respectfully submitted,

SOLERWITZ, SOLERWITZ, & LEEDS
(by) DAVID S. HELLER
170 Old Country Road
Mineola, New York 11501
(516) 742-4300

DSH:smc

Appendix J—MSPB Chief Administrative Law Judge McCarthy's National Discovery Order, Dated April 7, 1982—ACJ-1.

UNITED STATES OF AMERICA,

MERIT SYSTEMS PROTECTION BOARD.

◆

FORMER AIR TRAFFIC CONTROLLERS,

Appellants,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

Discovery No.: ALJ-1

◆

DISCOVERY ORDER

SUMMARY

The order that follows applies to the appeals of nonprobationary air traffic controllers who have filed timely discovery requests under the prehearing orders issued by the Board's Regional Offices. It provides, in summary:

Paragraphs 7-13: Approve limited discovery by appellants on matters of nationwide scope, and require appellants to select lead counsel or representatives for that purpose.

Paragraphs 14-15: Permit appellants to take depositions at the regional level, and provide for conduct of other region-wide discovery.

Paragraphs 16-20: Require FAA to produce for inspection and copying by appellants certain categories of documents and other information.

Paragraph 21: Provides method for modifying the application of this order or extending time limits.

TIME TABLE

Significant deadline dates for actions to be taken by the parties are as follows:

April 26, 1982	Board to be advised by appellants concerning their selection of lead counsel or representative(s).
April 23, 1982	FAA notifies appellants of location of, and arrangements for inspection and copying of, documents.
May 14, 1982	Appellants' interrogatories of national scope served by lead counsel on FAA.
May 28, 1982	FAA answers to interrogatories served on lead counsel.
May 31, 1982	Depositions at national and regional levels completed.

DISCOVERY ORDER

1. The Merit Systems Protection Board has approximately 11,000 appeals from air traffic controllers who were removed for allegedly participating in a strike and for unauthorized absence. In various pre-hearing orders issued by the Board's Regional Offices, the parties were instructed to submit discovery requests by February 25, 1982; any objections to such requests were to be filed by March 12, 1982.[1]

2. A substantial volume of discovery motions and objections has now been received. Although the Board has ruled on many of those requests, a great number of them are still pending. Some discovery requests seek information relevant to individual defenses, such as the assertion that the appellant failed to report to work for reasons unrelated to the strike. Others, however, request extensive disclosure of information to support the contentions, for example, that there was "command influence" behind the actions taken against the controllers, that the appellants' cases were prejudged, that there were various procedural irregularities, or that there was a conspiracy to break the controllers' union.

3. To develop evidence relating to such basic challenges of the FAA actions, various appellants have sought to depose, among others, President Reagan, numerous cabinet officials and agency heads, oral reply officials, proposing and deciding officials, superiors of oral reply

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[1] Much relevant information has already been received in the record of each individual appeal—that submitted by each appellant as part of the petition for appeal, and by the agency in response to each appeal. 5 C.F.R. §§ 1201.24-.25. The parties will also be required to identify their witnesses before the hearing.

officials, and those who advised any of the above. In addition, numerous written interrogatories propounded by appellants request information concerning, for example, procedures the FAA followed in these cases; the details of any discussions about possible criminal prosecution; the rules and practices of the FAA concerning leave; the possible existence of a national emergency on August 3, 1981; stress factors that affect the work of air traffic controllers; the names of the safety directors at each installation; and the particulars of all controller disability retirements granted in the last twelve years as well as all adverse actions taken by the FAA in the last fifteen years for absence without leave or for participation in a strike. The requests for production of documents are similarly wide-ranging.

4. The FAA has objected to many of these discovery requests on the grounds that they are not only burdensome but will also produce information of little value and of doubtful materiality. I agree that many of the requests[2] as now framed are so broad and extensive as to impose an unreasonable burden on FAA. Others request information that is clearly irrelevant, unduly repetitious, or not needed to prepare for hearing or to add significant information to the record. Were such requests granted, the burden on the administrative process would delay any hearings in these cases for the foreseeable future. Even where the requests are not burdensome standing alone, requiring the FAA to answer each request individually could cause substantial delay without corresponding benefits. *See Rando v. Luckenbach Steamship Co.,* 25 F.R.D. 483 (E.D.N.Y. 1960).

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[2] The requests and rulings will be identified by appellants' names and request numbers in the Regional Offices' orders authorized by this ruling.

5. Nevertheless, the appellants are entitled to information which is reasonably necessary to enable them to prepare their cases and to assure a fair adjudication. While the factual circumstances of these cases are not complex, the sheer number of cases makes the compilation and transmission of information a difficult task. Without some form of common discovery in which the parties cooperate, further delay in these proceedings could result.

6. In order to prescribe a manageable discovery procedure in these appeals, while balancing the goals of fairness to the parties and efficiency in disposing of an enormous volume of appeals, this order announces a form of common discovery at both national and regional levels. While the procedure will be supervised and controlled by an administrative law judge or regional representative of the Board, the good faith participation of litigants is not only expected but essential. Bearing in mind that traditionally those presiding have wide discretion in allowing discovery and that discovery is an aid to litigation, the scope of discovery will be limited not only as to subject matter but as to time alloted. A discovery plan, so controlled, is deemed essential to further the purposes of avoiding unproductive delay in adjudication while enabling the parties to obtain the information essential to perfect the record. 5 C.F.R. §1201.71.

NATIONAL DISCOVERY

7. Wherefore, it is hereby ORDERED that the motions of the several appellants who wish to depose President Reagan, other high level government officials, and their advisors are DENIED, except that the appellants will be permitted to depose J. Lynn Helms, Administrator of the FAA, in accordance with the plan hereinafter outlined.

Due to Mr. Helms' intimate familiarity with the pertinent facts and his overall responsibilities as the Administrator of the FAA, he is probably in the best position to provide the kind of information many appellants have requested concerning the policy and procedures which the FAA followed or was directed to follow, including the specific implementation of President Reagan's instructions.[3] Taking the depositions of others at the policy-making level would for the most part be duplicative and unproductive, and would be an unreasonable burden on the time of these Government leaders. *See Wirtz v. Local 30, International Union of Operating Engineers,* 34 F.R.D. 13, 14 (S.D.N.Y. 1963); *Sneaker Circus, Inc. v. Carter,* 457 F. Supp. 771, 794 note 33 (E.D.N.Y. 1978), *aff'd* 614 F.2d 1290 (2d Cir. 1979).[4]

8. (a) The single deposition of Mr. Helms shall take place in Washington, D.C., at a mutually convenient time and place. An administrative law judge will preside. The deposition shall be completed by *May 31, 1982.*

(b) Due to the large number of appellants, questioning at the deposition must be conducted by one or more lead counsel or representatives chosen for that purpose by those appellants who wish to obtain the benefit of having Mr. Helms' testimony. Designation of lead counsel serves two important purposes: (1) the deposition will be conducted more efficiently; and (2) all the appellants who wish to participate in the deposition will have the opportunity to submit their questions to lead counsel before the witness is deposed, and to obtain a copy of the transcribed testimony at a cost that is less than would be obtainable individually. The duties of lead counsel will include, among other things, coordination of the questions propounded by the various appellants to insure that there is no duplication of questions at the deposition and that all areas of proper inquiry are considered.

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[3] Lead counsel and the FAA may mutually agree to depose some other official instead of Mr. Helms if they believe another official would be more appropriate.

[4] This order applies only to requests which seek information of a national or regional scope. Pending discovery motions which seek to develop evidence which relates to specific factual defenses will be considered separately.

9. To insure a reasonable exchange of views concerning substantive and procedural matters and to provide for efficient deposition taking, no more than three lead counsel shall be selected. Accordingly, all appellants who have filed timely motions for discovery of national scope, including pro se appellants and those represented, shall select lead counsel. The names of those who represent the most appellants in other regions are attached to facilitate communication among the participants. The identity of lead counsel shall be given to the Office of Administrative Law Judges[5] and the FAA no later than *April 26, 1982.* The identity, address and phone number of lead counsel will be provided to appellants.

10. If the appellants are unable to agree on lead counsel, appellants are directed to file motions for designation of lead counsel with the Office of Administrative Law Judges no later than *April 26, 1982.* In the motions, appellants shall detail their attempts to agree on lead counsel, the reasons for the inability to agree, and recommendations for lead counsel, with reasons supporting each recommendation. If the parties are unable to agree, the administrative law judge may designate lead counsel.

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[5] Merit Systems Protection Board, Office of Administrative Law Judges, 1120 Vermont Avenue, N.W., Washington, D. C. 20419.

11. Those appellants who have filed timely requests for national discovery are advised that this will be the only opportunity to depose Mr. Helms—appellants who decline to participate through the lead counsel process will have no further opportunity to depose Mr. Helms. No appellant is obligated to participate, but those who do not will be deemed to have waived their right to depose the witness.

12. All appellants who wish to participate in the deposition should expect to bear a pro rata share of the cost of the deposition taking. Those who wish to obtain a transcript of the deposition will have to pay the cost for the transcript. Lead counsel will be entitled to reimbursement from the participating appellants for the time and expenses incurred as lead counsel, i.e., mailing and other expenses. *See In Re Aircrash Disaster Near Saigon, South Vietnam,* D.C. Cir. Nos. 80-2428, 81-1105, sl. op., Feb. 12, 1982. The method of reimbursement will be left to the agreement of the parties.

13. Because of the countless number of written interrogatories filed by appellants seeking information national in scope, it is ORDERED that the appellants' motions to require FAA to answer written interrogatories are hereby DENIED, except as follows. Lead counsel designated to represent appellants at the deposition of Mr. Helms will be permitted to serve written interrogatories upon the FAA concerning matters, not privileged, which are relevant to the appeals of all or most appellants. The interrogatories shall be limited to a total of 50 separate questions regardless of how they are numbered by the drafter. No additional interrogatories at the national level will be permitted except upon approval of the Board or an administrative law judge for good cause. Interrogatories pursuant to this order shall be served on the FAA on or before *May 14,*

1982, and answers thereto shall be served on lead counsel or before *May 28, 1982.*

REGIONAL DISCOVERY

14. The motions to depose various employees of the FAA in order to obtain information of a regional scope are DENIED except to the extent indicated herein.[6] In lieu of numerous depositions seeking information on the actions taken and procedures followed by the FAA, the agency shall designate one or more knowledgeable officers, agents or employees of the FAA from each of the FAA regional offices who shall be available for giving an oral deposition on relevant matters common to the appeals filed by former employees in the respective FAA Regions. It is expected that the deponents designated will be familiar with the pertinent policies, guidelines, instructions, and procedures which were to be followed in discharging the air traffic controllers, and the means by which such procedures were communicated and implemented at the facility level. These depositions shall be completed by *May 31, 1982.*

15. The Regional Directors of the Board are authorized to control the time, manner and place of the deposition(s) ordered in paragraph 14, and to sign and serve any order necessary to effectuate this ruling. Use of lead counsel at the regional level may be employed at the discretion of the Regional Directors.

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[6] See note 4 *supra.* Other pending discovery requests, including proposed interrogatories, will be considered separately.

PRODUCTION OF DOCUMENTS

16. The FAA is also ORDERED to make available from *April 23* to *May 20, 1982* for inspection and copying all documents pertaining to—

(a) the procedures, policies, and guidelines to be followed in discharging the controllers in 1981,

(b) internal personnel rules or regulations concerning leave and strikes,

(c) communications sent to the appellants before and during the strike which notified them when they were required to report to work.

17. Additionally, the FAA is to compile information as to how many air traffic controllers were not discharged after a proposal to remove for striking was issued to them in 1981, showing in each instance the reason for the decision not to remove. This information is to be presented for each facility or other usual organizational component.

18. The FAA shall compile an index of the public statements made during the period August 1, 1981 to August 7, 1981, by President Reagan, any cabinet official, and J. Lynn Helms directing the controllers to report to work or otherwise instructing the controllers as to their rights and obligations. The index shall include information as to where and how a copy or transcript of the statements may be obtained.

19. The FAA is to make the materials described in paragraphs 16, 17, and 18, above, available in each FAA region, with an appropriate index, and to notify the Board

and the appellants by *April 23, 1982* as to where and how such documents can be inspected and reproduced.

20. The FAA is also ORDERED to allow any appellant to inspect or copy his or her official personnel file at the site where such personnel file is maintained.

21. The terms of this order may be modified or time limits extended only upon motion and a showing of good cause. Motions related to national discovery shall be filed with the Board's Office of Administrative Law Judges (for address, see note 5, *supra*). Motions affecting regional discovery shall be filed with the appropriate regional office.

Dated: April 7, 1982

JOHN J. McCARTHY
Chief Administrative Law Judge

Appendix K—Extracts from Solerwitz Briefs to the FCCA in *Amodeo* and *Diancamano* Cases.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

Appeal No. 83-1162

◆

WILLIAM A. AMODEO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

◆

PETITIONER'S BRIEF

SOLERWITZ, SOLERWITZ & LEEDS
Attorneys for Petitioner
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STATEMENT OF THE CASE

Petitioner was employed by the Federal Aviation Administration (hereinafter F.A.A.) as an air traffic control specialist, GS-2152, since June 29, 1970. As of August, 1981, petitioner had reached the full performance level and was being paid at the level of GS 14-4, $41,657.00 per year. (A-155) During his 11 years of employment, petitioner had received letters of commendation on the following dates: February 18, 1972 and September 13, 1976. (A-51) His last Performance Evaluation Record rated him as satisfactory. (A-633)

On August 12, 1981, petitioner was sent a notice of proposed adverse action proposing his removal for allegedly participating in a strike and unauthorized absence (AWOL). (A-145) Petitioner made a written response to this proposal on August 14, 1981, A-148, and on August 25, 1981 was mailed a notice of termination, effective August 28, 1981. (A-153)

On September 2, 1981, petitioner filed a timely appeal of the termination action to the Merit Systems Protection Board. (A-6) On November 29, 1981, the agency filed its response to petitioner's appeal, (A-142), well beyond the fifteen-day period for response provided by 5 C.F.R. 1201.22(b). After innumerable delays, petitioner's appeal was consolidated for hearing and the hearing was held on September 22, 1982, one year after the filing of his appeal.

On October 14, 1982, a decision was rendered by the presiding official upholding the removal of petitioner. (A-806) The M.S.P.B. issued an Opinion and Order on April 25, 1983 sustaining this decision. (A-815) Petitioner timely appealed this action to this Court.

ARGUMENT

Summary of the Argument.

Petitioner submits that the action of the F.A.A. in removing him from his position was fatally flawed by procedural errors; all of these procedural errors were harmful on their own and the total number of procedural errors were *per se* harmful. Petitioner also submits that the F.A.A. committed errors of law which, by statute, mandate reversal of the F.A.A. action. Petitioner submits that he was illegally suspended during the agency removal action without pay. Petitioner submits that the agency did not make out a *prima facie* case or meet its burden of proof, and that in any event the M.S.P.B. has incorrectly applied the law as regards the agency's burden of proof. Petitioner submits that there is no nexus between

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

Appeal No. 83-1163

◆

ROBERT A. BIANCAMANO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

◆

PETITIONER'S BRIEF

SOLERWITZ, SOLERWITZ & LEEDS
Attorneys for Petitioner
170 Old Country Road
Mineola, New York 11501
(516) 742-4300

STATEMENT OF THE CASE

Petitioner was employed by the Federal Aviation Administration (hereinafter F.A.A.) as an air traffic control specialist, GS-2152, since June 29, 1970. As of August, 1981, petitioner had reached the full performance level and was being paid at the level of GS 14-4, $41,657.00 per year. (A-155) During his 11 years of employment, petitioner had received letters of commendation on the following dates: February 18, 1972 and September 13, 1976. (A-51) His last Performance Evaluation Record rated him as satisfactory. (A-633)

On August 12, 1981, petitioner was sent a notice of proposed adverse action proposing his removal for allegedly participating in a strike and unauthorized absence (AWOL). (A-145) Petitioner made a written response to this proposal on August 14, 1981, A-148, and on August 25, 1981 was mailed a notice of termination, effective August 28, 1981. (A-153)

On September 2, 1981, petitioner filed a timely appeal of the termination action to the Merit Systems Protection Board. (A-6) On November 29, 1981, the agency filed its response to petitioner's appeal, (A-142), well beyond the fifteen-day period for response provided by 5 C.F.R. 1201.22(b). After innumerable delays, petitioner's appeal was consolidated for hearing and the hearing was held on September 22, 1982, one year after the filing of his appeal.

On October 14, 1982, a decision was rendered by the presiding official upholding the removal of petitioner. (A-806) The M.S.P.B. issued an Opinion and Order on April 25, 1983 sustaining this decision. (A-815) Petitioner timely appealed this action to this Court.

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Appendix L—*Amodeo v. F.A.A.* ____ F.2d ____ (Fed. Cir. 4/17/86) Decision/Order Granting Summary Affirmance Dismissing Petitioners' Appeals.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

WILLIAM AMODEO NY075281F0430, ROBERT BIANCAMANO NY075281F0439, BRUCE BONACUM NY075281F0442, JOHN BRUNNER NY075281F0457, RICHARD BURNS NY075281F0460, KENNETH CARLSTROM NY075281F0469, CHARLES CONTEGNI NY075281F0487, CHARLES DARCY NY075281F0507, WAYNE ENNIS NY075281F0531, JAMES FINNEGAN NY075281F0538,

Petitioners,

v.

THE DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondent.

Appeal Nos. 83-1162, 83-1163, 83-1164, 83-1165, 83-1166, 83-1167, 83-1169, 83-1170, 83-1171, 83-1172

JUDGMENT

ON APPEAL from the Merit Systems Protection Board

These CAUSES having been heard and considered, it is

ORDERED and ADJUDGED: All of the above appeals are DISMISSED on Respondent's Motion for Summary Affirmance which is GRANTED and the decisions of the Merit Systems Protection Board are AFFIRMED.

Dated: August 14, 1985

ENTERED BY ORDER OF THE COURT

FRANCIS X. GINDHART
Chief Deputy Clerk

ISSUED AS A MANDATE: April 17, 1986

Appendix M—Opposition to Motion to Consolidate and for Protective Order.

Before the

MERIT SYSTEMS PROTECTION BOARD

New York Field Office

◆

AIR TRAFFIC CONTROLLERS,

Appellants,

v.

DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION,

Respondent.

Docket No. NY075281F

◆

The Appellants named on the attached schedule, by their attorney undersigned, oppose the Motion of the Agency (hereinafter FAA) for a Motion Limiting Discovery and for Consolidation, as well as for a Reconsideration, dated February 11th and 12th, and just received by this office from certain formerly *pro se* appellants.

1. The Motion for a Protective Order should be denied because it proposes a violation of the 5th and 6th Amend-

ments to the Constitution of the United States, insofar as it denies certain Appellants' Attorneys of their choice in favor of a selection among representatives by the MSPB. Moreover, the Appellants represented by this office present separate and distinct, and perhaps even antagonistic, positions which cannot properly be presented in the circus-like mass deposition proposed by FAA. Finally, to limit discovery to the areas of procedures and guidelines is to make discovery a hollow charade, signifying nothing. The Court of Claims has specifically permitted thorough-going discovery in adverse action cases, and FAA's financial hardships should not operate to emasculate Appellants' statutory rights. Indeed, FAA's financial hardships are nothing compared to those to which Appellants have been served. FAA can hardly face Appellants, whose spouses and children are without support, and cry for relief. When the relief requested is the convenient removal of Appellants' procedural rights, the sardonic flavor of hypocracy is palpable. This motion should be denied.

2. The same considerations dictate denial of FAA's Motion for Consolidation. If *any* consolidation should be granted, it should be for resolution of identical issues as called for by 5 CFR 1201.36(a)(1). Such consolidation is premature, at the very least, since the issues have not been developed in discovery. Consolidation by FAA's arbitrary geographic designation will waste Appellant's and MSPB's limited time and resources, duplicate issues, risk inconsistent determinations, and achieve no benefit but FAA convenience. It should be denied.

3. Finally, FAA's Motion for Reconsideration should be denied. Again, in the guise of seeking administrative economy, FAA seeks delay, in order to wage a war of attrition upon its adversaries. There is no reason MSPB and

the Appellants should be prejudiced by FAA's expressed desire not to process these cases in a timely fashion. Indeed, when this office rushed to serve papers on FAA on February 24, 1982, we were informed that all work ceased in that office at 4:30 in the afternoon. These "Bankers Hours" are intolerable in a professional context. FAA having brought about the situation by wrongful mass firings, coupled with insufficient staffing of its counsel's office, cannot seek benefit from its own wrong-doing. Since compliance with this Board's order is less burdensome to FAA than to private practitioners such as the undersigned, the FAA should not be heard to complain. The schedule should be adhered to so as to permit these cases to be decided by September 1, 1982, as the MSPB has represented they will fully be. See Federal Register, 2/16/82.

WHEREFORE, it is respectfully submitted that FAA's Motions should be denied in their entirety.

Respectfully submitted,

JACK B. SOLERWITZ, ESQ.
By: DAVID S. HELLER, ESQ.
Attorney for Appellants Listed
170 Old Country Road
Mineola, NY 11501
(516) 742-4300

Before the

MERIT SYSTEMS PROTECTION BOARD

New York Field Office

AIR TRAFFIC CONTROLLERS,

Appellants,

v.

DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION,

Respondent.

Docket No. NY075281F

ORDER

Federal Aviation Administration's Motion for Reconsideration, dated February 11, 1982, Motion for Consolidation, dated February 12, 1982, and Motion for a Protective Order, dated February 11, 1982, are hereby denied.

SO ORDERED

Presiding Official
Merit Systems Protection Board

Appendix N—Order, Dated February 24, 1983.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

In re

AIR TRAFFIC CONTROLLERS LITIGATION

Before FRIEDMAN, RICH, and DAVIS, *Circuit Judges.*

ORDER

There are pending before the court more than 225 petitions for review by former air traffic controllers challenging decisions of the Merit Systems Protection Board (the Board) sustaining the discharge of the controllers by the Federal Aviation Administration (the Administration) for participation in an illegal strike in August 1981. In most of the cases the petitioners filed suit in this court following decisions of various regional offices of the Board and did not ask the Board itself to review the cases. In two of the cases, however, the petitioners sought review by the Board of regional office decision and then filed petitions to review the final Board decisions in this court.[1]

The various cases raise a number of issues, including challenges to both the Administration's discharge of the controllers and the Board's affirmance of that action.

In addition to the cases before the court, the Board advises that it has pending more than 1,500 cases challenging decision of its regional offices. The Board will review five of those casese on an expedited basis as "lead cases,"[2] and it is expected that we will review Board decisions in those five cases. The decisions of this court in those five cases and the two cases already before us that the Board itself has reviewed are expected to determine most, or perhaps all, of the legal issues in the air traffic controllers litigation.

---

[1] *Schapansky v. Department of Transportation,* Appeal No. 83-663; *Johnson v. Department of Transportation,* Appeal No. 83-664.

On February 15, 1983, we suspended proceedings in three of the cases before us in which the petitioners directly challenged the decisions of the Board regional offices but did not seek review by the Board.[3] We did so because, in view of the large number of cases, it is appropriate that this court first determine the common controlling legal issues as soon as possible and thus avoid repetitious and unnecessary decision of the same issues in many cases.

We conclude that we should follow the same practice in the remaining cases until the seven lead cases finally have been determined.

Accordingly, IT IS ORDERED THAT:

1. All appeals from the Board, except for the seven cases listed in footnotes 1 and 2, in the Air Traffic Controllers litigation now pending before this court are stayed pending final disposition of those seven cases.

---

[2] *Richard T. Adams, et al. v. Federal Aviation Administration,* MSPB No. NY075281F0347; *Kipp C. Anderson v. Federal Aviation Administration,* MSPB No. SL075281F0347; *Gary S. Baracco v. Federal Aviation Administration,* MSPB No. DC075281F0895; *Robert L. Campbell v. Federal Aviation Administration,* MSPB No. DE075281F0697; and *Joseph R. Noa (Richard E. Golle, et al.) v. Federal Aviation Administration,* MSPB No. NY075281F0697.

[3] *Thomas R. Ferrando v. United States,* No. 83-687; *John M. Erickson v. United States,* No. 83-688; and *Michael J. Zullo v. United States,* No. 83-689.

2. The Board is to withhold transmission of the certified lists normally submitted to the court in lieu of the record.

3. Pending disposition of the seven cases, the Clerk of this court is directed to retain in a suspense file all pending petitions for review filed by Air Traffic Controllers, with accompanying fees, and to withhold docketing of any petition as an appeal.

February 24, 1983

Appendix O—Notice to Counsel and Petitioners in Air Traffic Controller Litigation

Enclosed are opinions in the Air Traffic Controller "Lead Cases."

The suspension entered by the Court on February 24, 1983 in all other Air Traffic Controller cases will remain in effect until final disposition of all the "Lead Cases."

You will be notified upon final disposition of all "Lead Cases." Within 30 days from the date of that notification you must notify this court in writing if you want to prosecute your appeal. If you do not so notify the court, your appeal will be dismissed. Retained filing fees will be returned.

The court has directed attention to the prosecution of frivolous appeals. *Wright v. United States,* 728 F.2d 1459 (1984); *Beachboard v. United States,* 727 F.2d 1092 (1984); *Connell v. Sears,* 722 F.2d 1542 (1983); and *Asberry v. United States,* 692 F.2d 1378 (1982).

May 18, 1984

GEORGE E. HUTCHINSON, Clerk

Appendix P—Notice to Counsel and Petitioners in Air Traffic Controller Litigation

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

717 Madison Place, N.W.
Washington, D.C. 20439

George E. Hutchinson
Clerk

Telephone: 633-6550
Area Code 202

The Supreme Court has completed final disposition of all "Lead Cases" and mandates have been issued in those cases to the Merit Systems Protection Board.

In accord with this court's notice of May 18, 1984, you are hereby notified that:

(1.) The suspension entered on February 24, 1983 will remain in effect to and including January 10, 1985. Before that date you must withdraw your present petition for review or file a renewed petition. If you do neither, your petition will be dismissed.

(2.) Any renewed petition must include a statement of the issues relied on and not decided in any of the "Lead Cases."[1]

(3.) Checks received with the initial petition are being returned with this notice. If you file a new petition, you must enclose a new check for the $65.00 filing fee.

---

[1] The "Lead Cases" can be found in 735 F.2d, pages 477 through 549.

(4.) The Court again directs attention to the impropriety of frivolous appeals. *Asberry v. United States,* 692 F.2nd 1378 (1982); *Connell v. Sears,* 722 F.2nd 1542 (1983); *Beachboard v. United States,* 727 F.2d 1092 (1984); and *Wright v. United States,* 728 F.2d 1459 (1984).

(5.) If you file a new petition, on or before January 10, 1985, your appeal will be docketed on receipt of that petition. You must file your brief within 60 days thereafter.

(6.) If you file a new petition, a certified list will not be required. If need arises, the list of documents of record may be ordered by the court, on motion or *sua sponte.*

(7.) The Court will not act on motions of respondent to dismiss or for summary affirmance in relation to a new petition until petitioner's brief/appendix has been filed.

FOR THE COURT

December 10, 1984 GEORGE E. HUTCHINSON
Clerk

Appendix Q—Petitioner's Brief in U.S. Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

Appeal No. 83-1163

◆

ROBERT A. BIANCAMANO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

◆

PETITIONER'S BRIEF

SOLERWITZ, SOLERWITZ & LEEDS
Attorneys for Petitioner
170 Old Country Road
Mineola, New York 11501
(516) 742-4300

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Appendix R—December 10, 1984 Letter of U.S. Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

717 Madison Place, N.W.
Washington, D.C. 20439

George E. Hutchinson
Clerk

Telephone: 633-6550
Area Code 202

December 10, 1984

Mr. Jack B. Solerwitz
Solerwitz, Solerwitz & Leeds
170 Old Country Road
Suite 310
Mineola, New York 11501

RE: John Brunner v. Department of Transportation,
FAA Appeal No. 83-1165

Dear Mr. Solerwitz:

The Supreme Court has completed final disposition of all air traffic controller "Lead Cases" and mandates have been issued in those cases to the Merit Systems Protection Board.

Your response received May 31, 1984, indicates your intent at that time to further prosecute this appeal.

If you now elect to prosecute this appeal, your brief/appendix will be due on or before *February 8, 1985*. If it is not filed by that date, the appeal will be dismissed.

Your brief must be directed to *issues not decided* in any of the "Lead Cases."*

The Court again directs attention to the impropriety of frivolous appeals. *Asberry v. United States,* 692 F.2d 1378 (1982); *Connell v. Sears,* 722 F.2d 1542 (1983); *Beachboard v. United States,* 727 F.2d 1092 (1984); and *Wright v. United States,* 728 F.2d 1459 (1984).

The Court will not act on motions of respondent to dismiss or for summary affirmance until petitioner's brief/appendix has been filed.

FOR THE COURT

GEORGE E. HUTCHINSON
Clerk

cc: Mary L. Jennings, Esq.
Sandra P. Spooner, Esq.

---

*The "Lead Cases" can be found in 735 F.2d, pages 477 through 549.

Appendix S—Rules of the United States Court of Appeals for the Federal Circuit.

Supplementing the Federal Rules of Appellate Procedure

seal

Effective: July 15, 1985

* * * torney as the attorney of record. Other attorneys assisting the attorney of record shall be designated as "of counsel."

(b) *Appearance.* Each attorney of record or individual appearing *pro se* must file a written appearance with the clerk within 10 days after the appeal has been docketed. Attorneys retained or appointed thereafter shall file an appearance within 10 days after being retained or appointed. The appearance shall include the name of the party or parties represented and the name, address, and telephone number of the attorney or the individual appearing *pro se.* Attorneys' appearances shall show the name of the law firms or public or quasi-public legal offices with which they are associated. Until such time as an attorney of record has filed a written appearance for a party or a party has appeared *pro se,* service of all papers shall be made upon that party's attorney of record in the proceeding below or upon the party if *pro se.* An attorney of record may not withdraw as such from the representation of a party without serving notice on the party and without the consent of the court.

Rule 8

CERTIFICATE OF INTEREST

Certificate of Interest. To enable determination of whether recusal is necessary or appropriate, an attorney for a party or *amicus curiae* other than the United States must furnish a certificate of interest stating:

(a) The full name of every party or *amicus* represented by the attorney in the case;

(b) The name of the real party in interest, if the party named in the caption is not the real party in interest;

(c) Any publicly held affiliates, if a party or *amicus* is a corporation;

(d) The names of all law firms whose partners or associates have appeared for the party in the lower tribunal or are expected to appear for the party in this court.

Twelve copies of the certificate shall be filed with the notice of appearance or with a motion or petition in this court, whichever occurs first. The text of the certificate (i.e., caption omitted) shall also be included in front of the table of contents of the main brief of a party and the brief of an *amicus*. The certificate shall be in the form set forth in the appendix to these rules.

III. PRACTICE

Rule 9

UNOPPOSED PROCEDURAL MOTIONS

Procedural Motions. Pursuant to FRAP 27(b), the clerk may dispose of any procedural motion timely filed and served, when the motion is consented to or unopposed and seeks to:

(a) Dismiss an appeal;

(b) Remand a case;

(c) Enlarge time for filing a brief, appendix, or petition, *et cetera,* or for designating the contents of an appendix;

(d) Stay issuance of a mandate pending application to the Supreme Court of the United States for a writ of certiorari for a period not to exceed 30 days;

(e) Consolidate appeals;

(f) Correct a brief or other paper;

(g) Correct or modify record in accordance with FRAP 10(e) or FRAP 16(b);

(h) File brief *amicus curiae* pursuant to FRAP 29;

(i) Grant an *amicus curiae* leave to participate in oral argument by sharing time with other counsel;

(j) Stay further proceedings;

(k) Withdraw or substitute an appearance or a party;

(l) Permit an excess of not more than ten pages beyond limitations contained in FRAP;

(m) Advance or continue a case.

Rule 10

NOTICE OF APPEAL, TRANSMITTAL OF CERTIFIED COPY OF DOCKET ENTRIES OR CERTIFIED LIST

(a) *Courts—Appeals as of Right*

(1) *Manner of Filing; Time for Filing.* A notice of appeal shall be filed in the manner and within the time prescribed by FRAP 4(a). If, pursuant to statute, the trial court has adopted a rule which deems a document filed on the date it is transmitted by a specified type of mail, a notice of appeal shall be deemed filed in accordance with that rule.

(2) *Service of the Notice of Appeal; Appeal Information Sheet; Certified Copy of Docket Entries.* Upon the filing of a notice of appeal, the clerk of the trial court shall serve copies of the notice of appeal as provided by FRAP 3(d). In addition, the clerk of the trial court shall promptly transmit to the clerk of this court: (a) a copy of the notice of appeal; (b) a certified copy of the docket entries (up to and including the notice of appeal); and, (c) the Appeal Information Sheet prescribed by this court.

(3) *Payment of Fees.* Upon the filing of any notice of appeal, the appellant shall pay to the clerk of the trial court such fees as are established by statute and also the docket fee prescribed by rule 17 of these rules, the latter to be received by the clerk of the trial court on behalf of this court.

(b) *Courts—Appeals by Permission*

(1) *General.* Appeals by permission pursuant to 28 U.S.C. 1292(d) shall be governed by FRAP 5(a), (b), and (c).

(2) *Grant of Permission; Payment of Fees; Cost Bond; Notice of Appeal Unnecessary.* Within 10 days after the entry of an order granting per * * *

Appendix T—Procedural Handbook of United States Court of Appeals for the Federal Circuit

seal

Effective February 1, 1984

* * * to argument it shall be served upon the other parties in a manner sufficient to insure receipt before the argument.

(h) *Amicus.*

Briefs of *amici curiae* are governed by FRAP 29 but shall not exceed 20 pages. No reply brief may be filed except in extraordinary circumstances.

(i) *Citations.*

Opinions of the court and its predecessors shall be cited as found in the *Federal Reporter* and, if reasonably available, the *U.S. Patents Quarterly.* CAFC 13(j).

13. TIMELY FILING

As provided in FRAP 25, papers, except briefs and appendices, are not timely filed unless actually received by the clerk within the time fixed for filing. Where the time is set by statute, including FRAP, no exceptions are permissible.

14. SERVICE

Service on a party represented by counsel must be on the counsel of record and may be personal or by mail. Service by mail is complete on mailing. Papers presented for filing shall contain proof of service. FRAP 25(d). The three-day mailing period permitted by FRAP 26(c) does not apply to the filing of the appellant's brief or appendix.

15. COMPUTATION AND EXTENSION OF TIME

Computation of the period for filing papers is governed by FRAP 26(a). The court will not grant extensions of time except under unusual circumstances creative of hardship.

16. MOTIONS

The filing of motions is governed by FRAP 27. Each motion shall be 8½ x 11 inches, without backing, shall be accompanied by a proposed order, and shall meet the service requirements of No. 13 above.

The clerk may grant, for the court, certain motions that are unopposed. CAFC 9. All other motions will be decided by a panel of judges, or by a judge. When deemed advisable, motions may be submitted to the full court for decision.

Appendix U—Federal Rules of Appellate Procedure.

Prescribed by the Supreme Court, December 4, 1967
Effective July 1, 1968

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7. Bond for Costs on Appeal in Civil Cases

Rule 26, n 4

* * * 60-day period and further under Rule 26(b) Federal Rules of Appellate Procedure court may not enlarge time for filing notice of appeal. *Seneca Grape Juice Corp. v United States* (1974) 61 CCPA 118, CAD 4486, 492 F2d 1235.

Compliance with Federal Rules of Appellate Procedure Rule 4(b) is mandatory and jurisdictional, and Court of Appeals is specifically precluded from enlarging time otherwise permitted for filing notice of appeal, by virtue of Federal Rules of Appellate Procedure § 26(b), particularly where case does not contain unique facts excusing noncompliance with rule. *United States v Miles* (1975, CA4 Md) 510 F2d 1362.

Under Rule 26(b), Federal Rules of Appellate Procedure, Court of Appeals may not enlarge time for filing notice of appeal. *Stirling v Chemical Bank* (1975, CA2 NY) 511 F2d 1030, 19 FR Serv 2d 1450.

Court of Appeals is prohibited, under FRAP, Rule 26(b) from undertaking on its own motion to extend time otherwise permitted for filing notice of appeal. *Morin v United States* (1975, CA4 Va) 522 F2d 8.

5.—Filing bill of costs

Appellants' failure to file their bill of costs within 14-day period specified by Rule 39(c), did not foreclose recovery of costs, since circumstances of particular situations may satisfactorily explain tardiness, and may call for allowance of costs nonetheless, and court in its discretion, may accommodate such situation, for it is empowered for good reason to enlarge period within which bill of costs may be filed, pursuant to Federal Rules of Appellate Procedure, Rule 26(b). *Saunders v Washington Metropolitan Area Transit Authority* (1974) 164 App DC 224, 505 F2d 331, 19 FR Serv 2d 424.

Rule 27. Motions

(a) Content of Motions; Response; Reply. Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion other than one for a procedural order [for which see subdivision (b)] within 7 days after service of the motion, but motions authorized by Rules 8, 9, 18 and 41 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion.

(b) Determination of Motions for Procedural Orders. Notwithstanding the provisions of (a) of this Rule 27 as to motions generally, motions for procedural orders, including any motion under Rule 26(b), may be acted upon at any time, without awaiting a response thereto, and pursuant to rule or order of the court, motions for specified types of procedural orders may be disposed of by the clerk. Any party adversely affected by such action may by application to the court request consideration, vacation or modification of such action.

(c) Power of a Single Judge to Entertain Motions. In addition to the authority expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise determine an appeal or other proceeding, and except that a court of appeals may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court.

(d) Form of Papers; Number of Copies. All papers relating to motions may be typewritten. Three copies shall be filed with the original, but the court may require that additional copies be furnished.
(Amended Apr. 30, 1979, effective Aug. 1, 1979)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on Appellate Rules. Subdivisions (a) and (b). Many motions seek relief of a sort which is ordinarily unopposed or which is granted as of course. The provision of subdivision (a) which permits any party to file a response in opposition to a motion within 7 days after its service upon him assumes that the motion is one of substance which ought not be acted upon without affording affected parties an opportunity to reply. A motion to dismiss or otherwise determine an appeal is clearly such a motion. Motions authorized by Rules 8, 9, 18 and 41 are likewise motions of substance; but in the nature of the relief sought, to afford an adversary an automatic delay of at least 7 days is undesirable, thus such motions may be acted upon after notice which is reasonable under the circumstances.

The term "motions for procedural orders" is used in subdivision (b) to describe motions which do not substantially affect the rights of the parties or the ultimate disposition of the appeal. To prevent delay in the disposition of such motions, subdivision (b) provides that they may be acted upon immediately without awaiting a response, subject to the right of any party who is adversely affected by the action to seek reconsideration.

Subdivision (c). Within the general consideration of procedure on motions is the problem of the power of a single circuit judge. Certain powers are granted to a single judge of a court of appeals by statute. Thus, under 28 USC § 2101(f) a single judge may stay execution and enforcement of a judgment to enable a party aggrieved to obtain certiorari; under 28 USC § 2251 a judge before whom a habeas corpus proceeding involving a person detained by state authority is pending may stay any proceeding against the person; under 28 USC § 2253 a single judge may issue a certificate of probable cause. In addition, certain of these rules expressly grant power to a single judge. See Rules 8, 9 and 18.

This subdivision empowers a single circuit judge to act upon virtually all requests for intermediate relief which may be made during the course of an appeal or other proceeding. By its terms he may entertain and act upon any motion other than a motion to dismiss or otherwise determine an appeal or other proceeding. But the relief sought must be "relief which under these rules may properly be sought by motion."

Examples of the power conferred on a single judge by this subdivision are: to extend the time for transmitting the record or docketing the appeal (Rules 11 and 12); to permit intervention in agency cases (Rule 15), or substitution in any case (Rule 43); to permit an appeal in forma * * *

Appendix V—Analysis of Cases Involving Sanctions for Improper Conduct During Litigation.

CITATION	STANDARD	SANCTIONS IMPOSED
	FIRST CIRCUIT	
NLRB v. Smith & Wesson 424 F.2d 1072 (1st Cir. 1970)	Amount of evidence supporting determination appealed from	Yes
Griffin Wellpoint v. Munro-Lamptrath, Inc. 269 F.2d 64 (1st Cir. 1959)	"Tricks of Advocacy" Miscitation in Brief"	Yes
	SECOND CIRCUIT	
Bankers Trust v. Publicker Industries 641 F.2d 1361 (2d Cir. 1981)	Delay	Yes
Fluoro Electric v. Branford Associates 489 F.2d 320 (2d Cir. 1973)	Repeated appeal of same issue	Yes
State of West Virginia v. Chas. Pfizer 440 F.2d 1079 (2d Cir. 1971)	Bad Faith	No
	THIRD CIRCUIT	
Ginsberg v. Stern 295 F.2d 698 (3d Cir. 1961)	False & Scandalous Matter in Brief	Yes

United States v. Montgomery 269 F.2d (3d Cir. 1959)	Delay	No

FOURTH CIRCUIT

Eaton v. New Haven City Bd. of Ed. 459 F.2d 684 (4th Cir. 1972)	Delay; Relitigation of Issue	Yes

FIFTH CIRCUIT

Harris v. Plastics Mfg. Co. 617 F.2d 438 (5th Cir. 1980)	No colorable legal or factual basis for Appeal	Yes

SEVENTH CIRCUIT

Ruderer v. Fines 614 F.2d 1128 (7th Cir. 1980)	Bad faith; frivolous; malicious; totally devoid of any semblance of colorable merit	Yes

NINTH CIRCUIT

Rederi A/B Saya v. S.S. Grand Grace 369 F.2d 159 (9th Cir. 1966)	Delay	No
Jaeger v. Canadian Bank of Commerce 327 F.2d 743 (1964)	Assertion of Unique Claim	No
Lowe v. Willacy 239 F.2d 179 (9th Cir. 1956)	Assertion of claim Invalid on its face	Yes

TENTH CIRCUIT

United States v. Rayco 616 F.2d 462 (10th Cir. 1980)	"Tricks of Advocacy" Mislead the Court	Yes

FEDERAL CIRCUIT

Griessenauer v. Dept. of Energy 754 F.2d 361 (Fed. Cir. 1985)	Lack of merit in arguments on appeal	Yes
Robinson v. FAA 769 F.2d 1556 (Fed. Cir. 1985)	Negative comments about Presiding Official	Yes
Syran v. MSPB 765 F.2d 1099 (Fed. Cir. 1985)	No possible basis for reversing MSPB's decision	Yes

D.C. CIRCUIT

Furbee v. Vantage Press 464 F.2d 835 (D.C. Cir. 1972)	Repeated Appeal of Same Issue	Yes